COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

AFFAIRE DE CERTAINES TERRES À PHOSPHATES À NAURU

(NAURU c. AUSTRALIE)

VOLUME III

Contre-mémoire de l'Australie ; procédure orale ;
réponses aux questions ; correspondance ; document

INTERNATIONAL COURT OF JUSTICE

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Les pièces de procédure relatives à cette affaire sont publiées dans l'ordre suivant :

Volume I. Requête introductive d'instance de Nauru ; mémoire de Nauru.

Volume II. Exceptions préliminaires de l'Australie ; exposé écrit de Nauru sur les exceptions préliminaires.

Volume III. Contre-mémoire de l'Australie ; procédure orale sur les exceptions préliminaires ; réponses écrites aux questions ; choix de correspondance ; document présenté à la Cour.

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La Haye, 2004.

The case concerning *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*, entered on the Court's General List on 19 May 1989 under Number 80, was the subject of a Judgment delivered on 26 June 1992 (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240). The case was removed from the List by an Order of 13 September 1993, following discontinuance by agreement of the Parties (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), I.C.J. Reports 1993*, p. 322).

The pleadings in the case are being published in the following order :

Volume I. Application instituting proceedings of Nauru; Memorial of Nauru.
Volume II. Preliminary objections of Australia; written statement of Nauru on the preliminary objections.
Volume III. Counter-Memorial of Australia; oral arguments on the preliminary objections; written replies to questions; selection of correspondence; document submitted to the Court.

*

Regarding the reproduction of case files, the Court has decided that henceforth, irrespective of the stage at which a case has terminated, publication should be confined to the written proceedings and oral arguments in the case, together with those documents, annexes and correspondence considered essential to illustrate its decision. The Court has also specifically requested that, whenever technically feasible, the volumes should consist of facsimile versions of the documents submitted to it, in the form in which they were produced by the parties.

Accordingly, certain documents reproduced in the present volume have been photographed from their original presentation.

For ease of use, in addition to the normal continuous pagination, wherever necessary this volume also contains, between square brackets on the inner margin of the pages, the original pagination of the pleadings reproduced and occasionally, within parentheses, the pagination of the original document.

In references by the Registry, bold Roman numerals are used to refer to Volumes of this edition; if they are immediately followed by a page reference, this relates to the new pagination of the Volume in question. On the other hand, the page numbers which are preceded by a reference to one of the pleadings relate to the original pagination of that pleading and accordingly refer to the bracketed pagination of the document in question.

In the case of the oral arguments, the original pagination is preceded by the number of the verbatim records as issued in a provisional duplicated form and carrying the reference CR 91/-- and it is also to the corresponding pagination between square brackets on the inner margin of the pages that one should refer for all cross-references.

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The Hague, 2004.

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CONTRE-MÉMOIRE DE L'AUSTRALIE

COUNTER-MEMORIAL OF AUSTRALIA

List of Abbreviations used in this Counter-Memorial

BPC	British Phosphate Commissioners
CR	Verbatim Record of Oral Hearings before the International Court
CSIRO	Commonwealth Scientific and Industrial Research Organisation
NLGC	Nauru Local Government Council
NM	Nauru Memorial

INTRODUCTION

Section I: What this case is about: the essence of the Nauruan claim

1. The issue in this case is whether Australia is responsible for the rehabilitation of phosphate lands on Nauru mined prior to 1 July 1967. The area mined prior to that date comprised approximately one-third of the phosphate lands. In effect, therefore, as Nauru concedes, responsibility for rehabilitation of two-thirds of the phosphate lands is a matter for Nauru alone (NM, para.207; CR 91/19 p.47). The phosphate lands themselves comprise according to one Nauruan statement sixty seven per cent of Nauru (Letter from President of Nauru, 6 October 1983, Annex 78, Vol.4, NM) or 1700 hectares out of an area of 2200 hectares (NM, para.207).

2. That responsibility for rehabilitation is the issue in dispute is clear from what Nauru itself says; from what the Court has said; and from what the facts themselves show.

3. The Application which instituted these proceedings alleges "a dispute ... over rehabilitation of certain phosphate lands [in Nauru] worked out before Nauruan independence" (Application, p.4; also paras.40, 41, 42). Nauru claims that Australia has legal responsibility to rehabilitate, or to provide the financial means for the rehabilitation of, Nauruan lands mined for phosphate prior to 1 July 1967 (Application, paras.45-49; NM, para.621; Oral Pleading Preliminary Objections, CR 91/18 p.10-11, 17, 21).

4. Nauru contends that rehabilitation was the only matter on which the Partner Governments and the Nauru Local Government Council (NLGC) could not agree prior to Nauruan independence. Since then the diplomatic correspondence and other actions leading to these proceedings have proceeded on the basis that responsibility for rehabilitation was the sole matter of disagreement between the parties. Thus, in the 1983 letter from the President of Nauru to the Australian Prime Minister, the President referred only to the rehabilitation of worked-out phosphate lands (Annex 78, Vol.4, NM). It was this claim that Australia rejected (Annex 79, Vol.4, NM). Indeed, it was the rehabilitation issue which led Nauru to establish a Commission of Inquiry in 1986. The Commission was asked to inquire into the nature and extent of responsibility for rehabilitation of phosphate lands worked out prior to independence (Annex 80, No.4, Vol.4, NM). Nauru has itself said that the institution of these proceedings was "a consequence of Australia's failure to respond to the findings of [the Commission's] report" (Annex 80, No.28, Vol.4, NM; see also CR 91/20 p.61).

5. The Court has also recognised that this case is solely about rehabilitation (see particularly paras.21 and 30 of the Preliminary Objections judgment, *ICJ Reports 1992*, pp.250, 253). It was only given the "particular circumstances of the case" that any rights that Nauru might have had in connection with rehabilitation of the lands remained unaffected by the termination of the Trusteeship Agreement.

6. The facts themselves also point to rehabilitation being the only issue in dispute. The issue of responsibility for rehabilitation was debated throughout the negotiation of the Canberra Agreement in 1967, and in the United Nations discussions in the years immediately preceding independence. It is this claim which the Court has decided was not on the facts waived by Nauru during those negotiations and discussions.

7. One consequence of the fact that rehabilitation is the only issue in dispute is that it limits the matters which can be dealt with in these proceedings. Thus, this case is not about whether Australia and the other States making up the Administering Authority paid Nauru a sufficient amount in the form of royalties for the phosphate during the period the British Phosphate Commissioners (BPC) mined the area. Nor does the Nauruan claim for rehabilitation entitle the Court to re-open the terms of the Canberra Agreement which transferred the phosphate industry to Nauru in order to determine its fairness. Nor can Nauru invite the Court to examine the royalties paid through the Mandate and Trusteeship periods and pronounce on their adequacy. Nor is this case about whether Nauru can afford to undertake rehabilitation. Nauru says that it has adequate funds to do this if it wishes (CR 91/19 p.53). So the issues become:

1. Was there a legal duty to rehabilitate? (If not, the matter ends there.)
2. If so, was this duty fulfilled *either*:
   - (a) by the general provision of funds, actual and prospective, made for the Nauruans under the Canberra Agreement?

     or

   - (b) was a specific earmarking of funds for this purpose required, irrespective of the magnitude of funds available under the Canberra Agreement?

3. If there was a duty, and if it was not fulfilled, what share of the responsibility should attach to Australia?

8. The essence of the Nauruan complaint is that there was an independent duty to rehabilitate which the Administering Authority failed to meet, because the Administering Authority did not carry out a rehabilitation program, nor establish a fund specifically committed to rehabilitation. In fact, given the shortness of time between the Nauruan decision to stay on the island and independence, rehabilitation by the Partner Governments themselves was not possible. Instead, but without conceding any duty to rehabilitate, the Administering Authority transferred various substantial funds and the whole phosphate industry to be used as Nauru saw fit, including the task of rehabilitation if the Nauruans so decided. It was the income from these funds and the industry which left Nauru in the position to be able to say today that it could carry out a rehabilitation program, if it so chose. So the funds were in fact adequate. Nauru's complaint is not that it was left unprovided for, but that neither BPC nor the Administering Authority gave it a fund *specifically designated* for rehabilitation so as to comply with that specific obligation.

Section II: Definition of rehabilitation

9. As already indicated, rehabilitation is the central issue. But what does rehabilitation involve? Views differ over time. The Davey Committee report in 1966 defined the issue in these terms:

> "Referred to in the past variously as 'restoring', 'resoiling', 'regenerating', 'rehabilitating', etc, the question apparently had as its objective some program of orderly treatment of those parts of the island denuded of their topsoil and phosphate. This would provide fertile areas of land suitable for the growing of coconuts, pandanus, tomano and other trees, and, in general, make for a more congenial environment for the Nauruans when the phosphate deposits were exhausted." (Annex 3, Vol.3, NM, p.211)

10. This reflects the fact that during the Trusteeship, rehabilitation was largely understood as consisting of destroying the limestone pinnacles and covering the remaining solid limestone with imported soil. At the time this would have required an enormous expenditure. The Committee had therefore thought rehabilitation to be impracticable.

11. Much more recently a Nauruan Commission of Inquiry, established in 1987, thought that rehabilitation meant:

> "(a) returning the land to its former state - or as near to the former state as is reasonably practicable - and this includes revegetation. This concept usually relates to grasslands or forest of low commercial value;
>
> or
>
> (b) reforming the land to a shape and condition suitable for a nominated land use." (Republic of Nauru, Commission of Inquiry into the Rehabilitation of Worked-Out Phosphate Lands of Nauru Report, p. 1133.)

12. The Commission's Report shows that the second had become a possibility only because of the great increase in technical and scientific knowledge since 1967. Not surprisingly, the Commission adopted it for the purposes of its inquiry. (Australia has at no time acknowledged as true the factual findings of the Commission nor the competence of the Commission to make findings as to the responsibility of Australia. It continues to reserve its position in this regard.)

13. The 1987 Commission did not consider that a specific portion of the mined-out land could be rehabilitated independently of the rest of the phosphate lands. It considered that any rehabilitation program should be part of a long term process of the implementation of a land use development policy for Nauru. These recommendations do not seem to have been heeded by Nauru in its submissions in this case or in any actions of the Nauruan Government. Further, Nauru has not adopted the same view of what is called for in a rehabilitation program. Although treating the report as authoritative, Nauru has defined "rehabilitation" more narrowly than the Commission. Thus, in its oral pleadings at the Preliminary Objections stage, it was said that rehabilitation was:

> "The process carried out to the point prior to implementation of a planned land use... In other words, rehabilitation would be reforming or returning the mined out lands to a suitable state to allow for a more congenial environment for the Nauruans when the phosphate deposits will be exhausted." (CR 91/19 p.10)

In other words, for the purposes of this case, rehabilitation is seen by Nauru as the preparation of the land for some as yet unidentified planned land use.

14. It is important when considering the existence of any alleged duty to rehabilitate to understand what the duty might embrace. The Nauruan claim necessarily depends on a showing that any rehabilitation sought by it was practicable during the trusteeship and is practicable today. Australia denies that rehabilitation was practicable at any time and thus cannot conceive of a legal duty to undertake something which is impractical.

Section III: Outline of this Counter-Memorial

15. In its Memorial, Nauru refers to a very wide set of facts, covering the whole administration of Nauru under both the Mandate and Trusteeship. Much of this material in Australia's view is irrelevant. Nevertheless, the Nauruan claim that there is a duty to rehabilitate does depend on certain facts relating to the administration of Nauru under Trusteeship, and the negotiation of the 1967 Agreement whereby the phosphate industry was transferred to Nauru.

16. The claim for rehabilitation can be considered only by way of a comprehensive examination of the circumstances surrounding the decisions of the Administering Authority in agreement with the Nauruan people to abandon resettlement, to transfer the phosphate industry on the terms set out in the Canberra Agreement, and to grant independence on the terms agreed, including transfer of responsibility for all Trust Funds. Although the Court was provided with an extensive analysis of the facts at the Preliminary Objections stage, Australia considers it appropriate to set out again for the benefit of the Court the salient facts and historical background. However, Australia has not reproduced as part of this Counter-Memorial the documentary annexes provided as part of the Preliminary Objections. Instead, this Counter-Memorial will provide references to those documentary annexes as appropriate.

17. Because this case is so fact-dependent, the first part of this Counter-Memorial is devoted to an objective presentation of the relevant facts. This is in contrast to the somewhat coloured and prejudicial portrayal of the facts given by Nauru in its Memorial and the inferences drawn from them. This first Part also notes some occasions where the Nauruan contentions on the facts are not accepted. So far as that Part does not directly contradict the Nauruan contentions, it is not, however, to be deemed an admission of those facts. Australia reserves its position in this regard.

18. The Counter-Memorial then turns to examine in detail the legal issues raised by the various Nauruan allegations of breach of a duty to rehabilitate. It first examines the alleged bases for the rehabilitation claim arising under the Trusteeship Agreement and general international law. It then deals with the various extraneous claims of breaches of international law made by Nauru that are unrelated to the claim for rehabilitation.

19. The Counter-Memorial concludes with a separate and wholly subsidiary Part on the Remedial Position. The formal submissions request the Court to reject the Nauruan claims.

PART I

HISTORICAL AND FACTUAL BACKGROUND

CHAPTER 1

AN HISTORICAL OVERVIEW OF THE PRE-TRUSTEESHIP PERIOD

Section I: The period of German administration

20. Nauru first came under European control in 1888. On 16 April 1888 the German Government placed Nauru within the Protectorate of the Marshall Islands (NM, para.10-12). Nauru seeks to contrast the German administration of the island with that of the mandatory powers who assumed control as a result of World War I. It points, in particular, to the supposed recognition by German law of indigenous land rights (NM, para.13-16) and the requirement to compensate for damage to mined land (NM, paras.22-27).

21. When the German representative surrendered to Australian forces in 1914 the population of Nauru was reported to be "30 Germans, 1700 natives and 500 Chinese" (109 BFSP 632-3). The phosphate industry was in its infancy, the first shipment taking place in 1907.

22. The interests of the island population were given little consideration by the German administration. In 1888, the Imperial German Government granted the Jaluit Gesellschaft a concession which included the right to exploit guano (phosphate) on the Marshall Islands and Nauru. Phosphate was not, however, discovered on Nauru until 1900. In the same year, the Jaluit Gesellschaft transferred its right to exploit the phosphate to the Pacific Islands Company, which later became the Pacific Phosphate Company, in return for financial benefits for itself.

23. The discovery of the phosphate gave land on the plateau of Nauru its economic significance. It was to provide the basis for more than a subsistence economy. Viviani summed up the position concerning the inhabitants as follows:

> "In the agreements between the German Government, the Jaluit Gesellschaft, and the Pacific Phosphate Company, only two clauses referred to the inhabitants of the island; one made it necessary for the mining company to give notice of commencement of operations so as to allow 'the necessary measures required in the interests of the natives' to be taken. The other allowed the Gesellschaft to assist the company in 'any claims by the natives of the Island against the

> Company'. Concern for the Nauruans was marked by its paucity, emphasising that the phosphate concession was based, if not on conquest, then on the island's occupation.
>
> Although the company's manager did not negotiate directly with the Nauruans, a royalty of 1/2d per ton of phosphate shipped was paid by the company to individual landowners and further sums were paid for the lease of land mined and in compensation for trees destroyed. In the six years from 1908 to 1913, when approximately 630,000 tons were shipped, Nauruan landowners received less than £1,320 on a commodity which was worth about 30s per ton - a total of £945,000. The payment of royalty had an interesting side effect, for land on the plateau, formerly considered almost worthless, became the subject of argument between individual landowners. The disputes over ownership arose because of the looseness of inheritance rules and were further complicated because the administration had ordered the return of land seized in the ten-years' war to its rightful owners." (N Viviani, *Nauru* (1970) p.34-5.)

24. The coming of European administrative control removed warfare as a means whereby land resources were adjusted to major changes in population. And with such control went a diminution of the authority of the traditional inhabitants over their land. This was a phenomenon applicable not just in Nauru, but throughout the Pacific, as well as in Australia and New Zealand. See R Crocombe (ed), *Land Tenure in the Pacific* (1971) p.8-12. In Australia, for example, minerals generally belonged exclusively to the Crown. The German law applicable at the time similarly took phosphate out of the landowner's control, (NM, para.24), although the German administration, like that of the mandatory powers, continued to recognise the interests of individual landowners in particular areas of land. Payments were made to the landowner under German law just as similar payments continued under the mandate administration (see paras.40 to 44 below). The German administration was not, as the Nauruan Memorial suggests (NM, para.26), more solicitous for the interests of the Nauruans than was that of the subsequent mandate powers. While the mining law of Germany applicable generally to the African and South Pacific protectorates may have purported to place some obligation on mine operators to "immediately and permanently" restore mined land (NM, para.25), the reality is that no rehabilitation took place under German administration, whatever the formal terms of law might have suggested. Indeed, the German administration

showed little, or no concern for the Nauruans in the few years it controlled phosphate mining. Under the Mandate the economic return to the Nauruans increased significantly (see para.43 below).

Section II: The Mandate period

A. 1914 CAPITULATION

25. The Australian Government's direct involvement with Nauru commenced in 1914 when Australian forces took action against Nauru at the request of the British Imperial Government. The German Government representative on Nauru surrendered on 9 September 1914. The island was included in the capitulation of German Pacific possessions dated 17 September 1914. An Administrator was appointed for the island by the High Commissioner for the Western Pacific on 27 October 1914 following instructions from the United Kingdom Secretary of State for the Colonies (109 BFSP 651). A civil administration under the jurisdiction of the High Commissioner was established on 1 January 1915 but, in accordance with the terms of the capitulation, local laws and customs were continued as far as practicable for the time being.

26. This indirect Australian involvement was put on a different basis with the grant of the Mandate and the conclusion of the 1919 Agreement between the United Kingdom, Australia and New Zealand.

B. GRANT OF MANDATE OVER NAURU

27. Mandates were created pursuant to Article 22 of the League of Nations Covenant, in order to administer territories formerly governed by the defeated powers, and which, on past practice, might have been annexed by the victorious States. The feature of the mandate system was that the territories would not be in the ownership of any State, but were entrusted to "Mandatory States" to administer on behalf of the League. (The Mandates system is summarised in the *South West Africa, (Preliminary Objections), Judgment, ICJ Reports 1962* at p.329; see also Murray, *The United Nations Trusteeship System* (1957) Ch.1.) As part of the arrangements agreed on during negotiations on the Treaty of Peace with Germany signed at Versailles on 28 June 1919, a Mandate was conferred on His Britannic Majesty in relation to Nauru. It was also agreed that this would be a "C" class Mandate. The allocation of Mandates was effected by the Allied Supreme Council in May 1919, before the Versailles Treaty was

signed. (Quincy Wright, *Mandates under the League of Nations* (1930) p.43; Duncan Hall, *Mandates, Dependencies and Trusteeship* (1948) pp.145-7.)

28. As is well known, Article 22 recognised three classes of Mandate, which have come to be referred to as "A" "B" and "C" class Mandates. The "A" Mandates are referred to in Article 22.4 as:

> "certain communities formerly belonging to the Turkish Empire [which] have reached a stage of development where their existence as independent nations can be recognised subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory."

The "B" Mandates refer to less developed territories (Art.22.5):

> "other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals; the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives other than for police purposes and the defence of territory, and will also secure equal opportunities for the trade and commerce of other Members of the League."

29. This last requirement of equal trade opportunities became known as "the open door". The "C" class mandates were created at the insistence of the British Empire delegates at the Peace Conference to avoid the open door for immigration and trade for certain territories adjacent to Dominions (Quincy Wright, *Mandates under the League of Nations* (1930) pp.37,47; Duncan Hall, *Mandates, Dependencies and Trusteeship*, (1948) p.113); Charles Rousseau, *Droit international public*, Vol.II, (1974) p.383. The "C" Mandates are described as follows (Art.22.6):

> "There are territories such as South-West Africa and certain of the South Pacific Islands, which, owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilisation, or their geographical contiguity to the territory of the

> Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards abovementioned in the interests of the indigenous population."

30. The "open door" policy applicable to "A" or "B" class Mandates did not apply to "C" class Mandates. This latter category, with its exclusion of the "open door" and right of administration as "integral portions" of the territory of the Mandatory power, was thus significantly different from the other classes of Mandate.

31. The actual terms of the Mandate over Nauru, in elaboration of Article 22 of the Covenant, were adopted by the Council of the League of Nations on 17 December 1920 (for text see Annex 27, Vol.4, NM). The Mandate confirmed that it was a Mandate granted to "His Britannic Majesty". Australia was not mentioned. Its involvement came as a result of the 1919 Agreement (see para.48 below). The terms of the Mandate dealt with a number of specific issues, such as the slave trade and traffic in arms and ammunition (Art.3), military training (Art.4), freedom of conscience and admission of missionaries (Art.5). The Mandatory was given "full power of administration and legislation over the territory subject to the present Mandate as an integral portion of his territory" (Art.2). The Mandatory was to "promote to the utmost the material and moral well-being and the social progress of the inhabitants" of Nauru. The Mandate also contained provision for any dispute between the Mandatory and another Member of the League to be referred to the Permanent Court of International Justice if it could not be settled by negotiation (Art.7).

32. The Mandate was undertaken on the basis that it would be exercised "on behalf of the League of Nations" (3rd preambular paragraph), and the Mandatory undertook to make annual reports to the Council of the League (Art.6). The Administrator in September 1921 in fact provided a report to the Council of the League on the pre-mandate period which provided information about the island since 1915. The first annual report was made to the Council in March 1922 covering the period 17 December 1920 to 31 December 1921. The 1923 Agreement which amended the 1919 Agreement makes clear that such reports would be "transmitted by the Administrator through the Contracting Government by which he has been appointed to His Majesty's Government in London for presentation to the Council on behalf of the British Empire as Mandatory" (clause 4) (for text of 1923 Agreement see Annex 28, Vol.4, NM).

33. The Mandate was not a Mandate granted to Australia. Although Australia provided the administration for Nauru and was otherwise involved in decisions concerning the island, it did so solely in its capacity as the designated representative of the three Contracting Governments to the Nauru Island Agreement 1919. The 1919 Agreement created an administrative framework to implement the Mandate granted to His Britannic Majesty. In accordance with the Agreement, Australia consulted with the United Kingdom and New Zealand on all major matters.

34. The right of the Mandatory to administer mandate territories such as Nauru as "an integral portion of their own territory" is of particular significance. Whatever the motives of the mandatory powers in accepting the Mandate, the fact is that "C" class mandates were able to be administered under the same laws and administrative practices followed in the territory of the Administering States. The Administering Authority was given "full power of administration and legislation" (Art.2 of Mandate) over the territory as an integral portion of its territory. The standards applicable to the "C" class mandate of Nauru differred as a matter of law from those applicable to more advanced dependent territories. Moreover, the "material and moral well being and the social progress of the inhabitants" which the Mandatory was to promote, if relevant, does not fall to be judged by some ideal 1990's standard of disinterest. It falls to be judged by the standards and practices applied within the Administering Party at the time.

C. ADMINISTRATION UNDER THE MANDATE

35. Detailed reports on the administration of Nauru during the Mandate were supplied annually to the League of Nations. (Copies of these reports, as well as of the reports during the Trusteeship period, were made available to the Court prior to the Preliminary Objections hearing and remain with the Court.) The reports included information on Ordinances made for the Territory, and, from the 1923 report onwards, contained financial accounts of BPC. The reports were structured around the questionnaire issued by the League for "C" class Mandates.

36. The first Administrator, an Australian nominee in accordance with the 1919 Agreement, remained in office until June 1927 when he was replaced by another Australian nominee, with the concurrence of the British and New Zealand Governments. This same procedure occurred on other occasions when appointment of a new Administrator was necessary.

37. A Nauruan Advisory Council was established in July 1927. It consisted of the Head Chief and Deputy Head Chief and the Chiefs of each of the fourteen districts. This Council advised the Administration in relation to a wide range of matters of concern to the Nauruan people. While the Administrator reported directly to the Australian Government as the appointing Government, the other two Governments party to the 1919 Agreement were kept fully informed of all major administrative decisions.

38. The views of the Nauruan people themselves as to the situation under the Mandate, whereby it was all three Governments that were responsible for their welfare, is reflected in the following statement by the Head Chief reported in the 1932 annual report on the Administration of Nauru to the League of Nations.

> "We Nauruans are very proud of our island and our governmental institutions, and we are very grateful to the League of Nations for enabling us to work out our destiny under wise and beneficient rule. We know that, until such time as we are able to stand by ourselves amid the strenuous conditions of the modern world, we may rely upon the protecting and sympathetic arms of the powerful nations of Great Britain, Australia and New Zealand. We have full confidence in the Mandatory system of control, and we will ever be grateful for the opportunities made available to us by the League of Nations of gaining knowledge in educational matters and in local government procedure." (p.20)

39. Because the Nauruan claims do not relate to the period of the Mandate (para.240 below), it is unnecessary to provide a detailed account in this Counter-Memorial of the Australian administration of Nauru during this period, although the role of BPC and the concession is considered in Section III. This Counter-Memorial also briefly addresses Nauruan allegations concerning the Lands Ordinances and the benefits derived during the mandate period from phosphate mining in the following paragraphs.

40. The Nauruan Memorial (paras.80-100 and 521-541) deals with the phosphate mining in Nauru during the Mandate and the role of the BPC by focussing on the Lands Ordinances of 1921 and 1927. The 1921 Lands Ordinance was, at the time, a significant step forward: the royalty was increased from the 1/2d per ton which had operated under the German regime to 3d. The consent of Nauruan landowners was obtained to the royalty rates provided for in the 1921 Ordinance, and it was agreed that those rates should apply for a six

year period only. Accordingly, royalty rates were reviewed in 1927 and further increases in payments to Nauruans agreed (Annex 2 to Preliminary Objections).

41. The royalty agreement of 1927 was concluded between the Nauruan landowners and the British Phosphate Commissioners (whose role is discussed at para.50 below) and was implemented by the 1927 Lands Ordinance. The report on Nauru submitted in 1927 by the Administering Authority to the League of Nations records that representatives of the Nauruan landowners conveyed to the Administrator the following message:

> "We would like to place on record an expression of our complete satisfaction with the terms of the agreement recently entered into with the British Phosphate Commissioners and our appreciation of the care which was taken by the Administration in safeguarding the interests of the Nauruan landowners." (1927 Report, p.29)

The agreement reached in 1927 was intended to last 20 years. The formula provided for five yearly reviews based on fob price (see cl.4(b) of 1927 Lands Ordinance, Annex 36, Vol.4, NM).

42. Subsequent reductions in the price of phosphate, however, necessitated further revision, as the parties to the royalty agreement had not contemplated a fall in royalties. Agreement was reached in 1938 on revised rates for the 1937-1947 and 1947-1967 periods (see 1939 Lands Ordinance, Annex 38, Vol.4, NM). The 1938 annual report by the Administering Authority to the League indicates the situation surrounding the 1938 negotiations and what was agreed in consequence. Relevant passages read:

> "In 1927, the price of phosphate fob Nauru was 23s per ton. In 1932 (the end of the first period of five years) the price of phosphate had risen to 24s.6d per ton, and the royalty paid to the individual landowner was accordingly increased from 4d to 4 3/8d per ton and payment was made at that rate until 1937, when the second review under the Agreement was due. In June, 1937, the price of phosphate had fallen to 14s per ton. If the terms of the Agreement were followed the royalty would be reduced from 4 3/8d. per ton to 1 3/4d per ton. This decrease in the rate was considered by all parties to be inequitable and negotiations were commenced between the Administrator, the British Phosphate Commissioners and the Chiefs

> representing the Nauruan landowners with the object of finding a basis acceptable to all parties for variation of the Agreement.
>
> After lengthy negotiations an Interim Agreement was signed on 7th December, 1938, whereby the parties concerned agreed to the following variations in the Agreement:
>
> > 1. The present Agreement to be extended until the 30th June, 1947:
> >
> > 2. The following alterations in the terms of the Agreement to have effect from 1st July, 1937, and to continue in force until 30th June, 1947:
> >
> > 1 1/2d per ton to be paid to the Administrator to be used solely for the benefit of the Nauruan people (no variation).
> >
> > 2 1/2d per ton (instead of 2d as at present) to be paid to the Administrator to be held in trust for the landowner(s) and invested for a period of twenty years at compound interest.
> >
> > 4d per ton to be paid to the Nauruan landowner(s) (instead of 1 3/4d per ton that would be payable if the present Agreement were not altered). The rate of 4d to be reviewed at the end of five years from 1st July, 1937, and if the fob price of phosphate is then in excess of 14s per ton, the royalty of 4d per ton to be increased by 1/4d per ton for every 1s. per ton by which the fob price of phosphate exceeds 14s per ton. The rate of royalty not to exceed 6d per ton at any time."

43. As to the position in relation to financial benefits for the Nauruans from phosphate mining during the Mandate period, the position has been summarised as follows:

> "In the nineteen years in which the BPC worked the phosphate up to World War II Nauruan royalties rose from 1/2d per ton in 1920 to 8d per ton in 1939. Of this 8d a ton, half was a cash payment, one quarter was spent on works and education for the Nauruan community and one quarter was held in trust for landowners. The total royalty paid to Nauruans in 1939 was 5.1 per cent of the fob price of Nauru phosphate. Another 4.1 per cent of the value of the phosphate was paid

by the BPC for administration costs and about half of this was spent solely for Nauruans." (N Viviani, *Nauru* (1970) p.72.)

44. Each of the Ordinances were made as a result of negotiation and agreement with the Nauruan landowners. Payment for phosphate was made to the individual landowners as well as to a trust fund invested for the landowners. And the rate of royalties paid was regularly reviewed, both during the Mandate period and subsequently. Individual landowners did not, it is true, have a veto over use of phosphate land for mining but this legal regime was commonplace at the time, both in the Pacific and in Australia and New Zealand. In this regard, Nauruan landowners were in the same position as their Australian counterparts. Nauruans did not complain during the Mandate period of expropriation or make any complaint as to the adequacy of the royalty return.

45. The Mandate system was affected by the outbreak of World War II, and Nauru was not immune from this. In December 1940 German raiders shelled the phosphate plant and sank several British and allied merchant vessels owned by or under charter to the BPC. There was no further German action, and phosphate continued to be shipped, although at a reduced rate. In August 1942 Nauru was occupied by Japanese forces. The Australian Administrator and remaining officials were executed. Many Nauruans were deported to Truk. In September 1945 the allied forces retook the island, which reverted to civilian administration in November 1945. Phosphate exports did not resume until 1947 when repairs to the phosphate works and port facilities had been undertaken. The Nauruans on Truk returned on 31 January 1946. The Nauruans suffered greatly during this period. (No allegations by Nauru against Australia relate to the period of Japanese occupation.)

Section III: The 1919 Agreement and the BPC concession

A. HISTORY OF THE CONCESSION

46. The BPC concession on Nauru derived from two sources: its succession to the concessionary rights of the Pacific Phosphate Company in 1920 and the terms of the 1919 Nauru Agreement concluded between the United Kingdom, Australia and New Zealand.

47. On 21 January 1888, prior to the establishment of a Protectorate, the Imperial Government of Germany had granted to the German firm, Jaluit Gesellschaft, the right, *inter alia*, to exploit guano deposits in the Marshall

Islands and Nauru (p.87, Ch.4, Vol.1, Part I, 1988 Nauru Commission of Inquiry into the Rehabilitation of the Worked-out Phosphate Islands of Nauru). The original 1888 Jaluit concession, to run to 1906, was assigned in 1900 to the Pacific Islands Company which, in turn, was taken over by the Pacific Phosphate Company (formed with both British and German capital). In 1905 this concession, including the "exclusive right of exploiting" the phosphate deposits, was continued for a period of 94 years beginning on 1 April 1906, thus extending the rights under the concession to the year 2000 (Annex 43, Vol.4, NM). The Pacific Phosphate Company also took over the extended Jaluit concession in 1906 with the consent of the Imperial German Government (Annex 44, Vol.4, NM).

48. On 2 July 1919 the Governments of the United Kingdom, Australia and New Zealand concluded the Nauru Island Agreement to make provision for the administration of the island and the mining of phosphate (Annex 26, Vol.4, NM). The two preambular paragraphs read:

> "Whereas a Mandate for the administration of the Island of Nauru has been conferred by the Allied and Associated powers upon the British Empire and such Mandate will come into operation on the coming into force of the Treaty of Peace with Germany, and
>
> Whereas it is necessary to make provision for the exercise of the said Mandate and for the mining of the phosphate deposits on the island."

The Agreement then dealt with the administration and set up a Board of Commissioners to be responsible for mining. Articles 6, 7 and 9 dealt with title and rights to phosphate.

> "Article 6
>
> The title to the phosphate deposits on the island of Nauru and to all land, buildings, plant and equipment on the island used in connexion with the working of the deposits, shall be vested in the Commissioners.
>
> Article 7
>
> Any right, title or interest which the Pacific Phosphate Company or any person may have in the said deposits, land, buildings, plant and equipment (so far as such right, title and interest is not dealt with by

> the Treaty of Peace) shall be converted into a claim for compensation at fair valuation.
>
> Article 9
>
> The deposits shall be worked and sold under the direction, management, and control of the Commissioners subject to the terms of this Agreement.
>
> ..."

49. On 25 June 1920 by an Agreement between King George V and Others and the Pacific Phosphate Company, the Governments of the United Kingdom, Australia and New Zealand bought out the Company (Annex 45, Vol.4, NM). The five page preamble to the Agreement gave a history of the Nauru (and Ocean Island) concession and the 1919 Nauru Agreement. Under Article 1 the Company agreed to sell and transfer to the three Governments "all the right title and interest of the Company in the guano phosphate deposits in and upon [Ocean and Nauru] Islands ... including:

> "(b) The full benefits of the Marshall Islands Concession and the German Agreements so far only as the same relate to the Island of Nauru and all the right title and interest of the Company in such Concession and Agreements so far as the same respectively relate to the said Island of Nauru for the whole of the residue of the period for which such concession is granted but subject to the covenants stipulations and conditions therein and in the said agreements contained.
>
> (c) The full benefits of all leases tenancies and other rights to or over lands in the said Islands under land deeds or leases made between native landowners of the said Islands and the Company and belonging to the Company and registered in the Office of the Resident Commissioner for the Gilbert and Ellice Islands Colony at Ocean Island aforesaid and in the office of the Civil Administrator at Nauru for all the respective unexpired residues of the terms of years thereby created and for all the estate and interest of the Company in the same premises subject to the payments and royalties thereby reserved and the covenants and conditions therein contained."

The agreed price was 3.5 million pounds. By an Indenture dated 31 December 1920 (Annex 46, Vol.4, NM) the Company and the three Governments passed to the Board of Commissioners established by the 1919 Agreement "the whole of the undertaking and assets of the Company on ... the Island of Nauru".

50. The BPC operated throughout the period from 1920 until 1967 as a separate body, distinct from the Administration on Nauru. Whilst established by the three Governments, the BPC was treated throughout its life on Nauru as a commercial entity. Under the supervision of the Administrator the BPC negotiated directly with the Nauruans over the royalties to be paid to the Nauruans for most of the mandate and trusteeship period. Only in the few years leading up to independence did the Partner Governments become active participants in the consultations and negotiations concerning the future of the phosphate industry. During the Trusteeship financial information on the BPC operations was nevertheless provided to the United Nations. (This is discussed in paragraphs 108 to 119 below.)

B. THE 1919 AGREEMENT

51. The 1919 Agreement dealt with two issues:

(a) the administration of Nauru; and

(b) phosphate mining on Nauru.

For the purposes of administration, an Administrator was appointed with power to make Ordinances for the peace, order and good government of the Island. The initial appointment, by agreement of the three Governments, was to be made by Australia for a term of five years and thereafter "in such manner as the three Governments decide" (Art.1). It was also provided that "all expenses of the administration" so far as not met by other revenues, were to be defrayed out of the proceeds of the phosphates (Art.2).

52. The 1919 Agreement was amended in 1923 to clarify the relationship between the Administrator and the three Governments. This Agreement in effect required the Administrator to refer Ordinances, and be answerable, to the Contracting Government by which he was appointed (for text see Annex 28, Vol.4, NM). However, the Administrator was to provide copies of any ordinances, proclamations and regulations to the other two Contracting Governments. He was also to supply "such other information regarding the administration of the Island as either of the other Contracting Governments shall

require" (Art.3). In 1965 these administrative arrangements were altered by further agreement, pursuant to which Legislative and Executive Councils were established (for text see Annex 30, Vol.4, NM; also para.68 below).

53. The Board of Commissioners which was to be responsible for phosphate mining was comprised of three members, one appointed by each Government party to the Agreement (Art.3). Each Government retained control over its appointee as his appointment was during the pleasure of that Government (Art.4). As already noted, under the Agreement title to phosphate deposits vested in them; and the entire interest of the previous owner of the phosphate concession on Nauru, the Pacific Phosphate Company, was converted to a claim for compensation (Arts.6 and 7).

54. The Commissioners (who were known as the British Phosphate Commissioners, and commonly called BPC) were required to work and dispose of the phosphate:

> "for the purposes of the agricultural requirements of the United Kingdom, Australia and New Zealand, so far as those requirements extend" (Art.9).

The proportion in which each Government could secure phosphates was set out in Article 14. Approval of all three Commissioners was necessary before phosphate could be sold or supplied to any country other than United Kingdom, New Zealand and Australia (Art.10).

55. The Agreement also dealt with the pricing of phosphate (Art.11). This required phosphate to be:

> "supplied to the United Kingdom, Australia and New Zealand at the same fob price, to be fixed by the Commissioners on a basis which will cover working expenses, cost of management, contribution to Administrative expenses, interest on capital, a sinking fund for the redemption of capital and for other purposes unanimously agreed on by the Commissioners and other charges."

At the time they were concluded, the 1919 and 1923 Agreements were regarded as *inter se* arrangements between members of the British Empire. This represented the then perceived unity of the Imperial Crown on which the Mandate (and the consequent responsibility for the administration of Nauru) had been conferred. The agreements were not registered with the League of Nations as treaties.

56. The 1919 Agreement as amended continued to govern the operation of the BPC until 1967 when control of the phosphates passed to Nauru pursuant to agreement with Australia, the United Kingdom and New Zealand.

C. THE RESULTANT POSITION

57. The actions of the BPC were principally those of a commercial trading company. The BPC acquired a commercial concern from the Pacific Phosphate Company and succeeded to its entitlement to mine phosphates. The Phosphate Company was, in turn, the successor to the rights of the German Jaluit Gesellschaft when it obtained those rights by assignment in 1900. Neither the concession to mine phosphates nor its acquisition were unlawful. By acquiring by transfer the previously existing rights of the Company to mine phosphate, the BPC did not engage in expropriation. Nor did the actions of the three Partner Governments amount to expropriation. They took over a concession of a kind that was not uncommon in the then colonial situation throughout the world (see NM, paras.86, 98, 515).

58. Like any other commercial concern, the BPC had certain identifiable commercial objects, in particular to sell phosphate at a price (subject to certain requirements) to meet the agricultural requirements of the United Kingdom, Australia and New Zealand (Arts.9, 10 and 11 of the 1919 Agreement, set out above). Any phosphates not required by the three governments were to be sold at the best price obtainable (Art.11). The position of the three Governments under the 1919 Agreement is comparable to that of the owners of a private trading concern who create that concern for some particular trading purpose. In the same way, the three Partner Governments created the BPC as a largely commercial entity to supply phosphate to their domestic markets. Whether or not the Administration ever took an independent position, opposed to the vital interests of the BPC, is immaterial (cf NM, para.541) unless Nauru can also show that by reason of some particular acts the Administration was in fact in breach of a relevant international obligation. This Nauru does not do.

59. Nauru also sets out at some length the politics of the making of the Lands Ordinances (NM, paras.522 to 538), but the relevance of this is not clear. Under the original German concession the right to mine phosphate was given absolutely to the concession owner. The payments under the Lands Ordinances

were a recognition that the Nauruan people should be provided with some greater benefits from phosphate mining than would otherwise have been provided. Whether royalties were payable under the terms of the 1919 Agreement was debated within Australian government circles (see NM, paras.327-331, 369). The fact was, however, that royalties were paid at an increasing rate throughout the Mandate and Trusteeship and Nauru thereby received significant economic benefit from the phosphate mining (see paras.87 to 107 below).

60. The relationship of the 1919 Agreement and the concession to the Partner Governments' obligations under the Trusteeship is considered below (at paras.285 to 290). The nature of the reports on the BPC made by the Administering Authority to the United Nations is also examined (paras.108 to 119). It is contended that there was no incompatibility between the 1919 Agreement and the Trusteeship.

CHAPTER 2: NAURU UNDER TRUSTEESHIP

Section I: Political and administrative advancement

61. The political and administrative system, which was progressively modified until the advent of independence in January 1968, is described in the annual reports of the Administering Authority to the United Nations, in the reports of the Trusteeship Council and in the six reports of the United Nations Visiting Missions. Broadly speaking the territorial Administration was headed by an Administrator, appointed by the Australian Government with the concurrence of the United Kingdom and New Zealand Governments. The Administrator controlled a number of Departments mostly staffed by Nauruans.

62. Before World War II the Administration was advised by the Nauruan Council of Chiefs. This body, which was based on Nauruan custom, was revived after the war. In 1951 it was replaced by the Nauru Local Government Council (NLGC) consisting of nine Councillors elected for four years by all Nauruans over 21. One Councillor was chosen as Head Chief. The Council advised on Nauruan matters and maintained peace, order and good government among the Nauruans.

63. A description of the powers of the Council and its activities is available in the annual reports of the Administering Authority (which have previously been made available to the Court) and in the six reports of the United Nations Visiting Missions (see Annexes 7 to 12, Vol.4, NM). For instance, the 1959 Visiting Mission described its powers as follows:

> "The Council may advise the Administration on any matter affecting Nauruans, including the enactment of new ordinances, and has the power, subject to approval of the Administrator, to make rules, not inconsistent with the legislation of the Territory, for regulating the conduct of its business and for the peace, order and welfare of the Nauruans. It may also organise, finance, and engage in any business or enterprise and provide or co-operate with the Administration in providing any public or social service." (para.26)

As the social and economic development of Nauru progressed, so did demands for political advancement. The first direct Nauruan participation in the work of the Trusteeship Council occurred in 1961. A Nauruan representative attended each session of the Council when the report on Nauru was considered as adviser to the Special Representative of the Administering Authority. This continued until independence.

64. The powers and functions of the NLGC were enlarged in 1963. As the 1965 United Nations Visiting Mission said, this enlargement represented "an advance in the political development of the Council and the Nauruan people" (para.13, Annex 12, Vol.4, NM). Elections to the Council were held in December 1951, 1955, 1959, 1963 and 1967. In 1955 Councillor Hammer DeRoburt was elected as Head Chief, a position he retained until the abolition of the Council in 1992.

65. As well, consistent with the obligations under the Trusteeship Agreement, Nauruans were increasingly employed in the Administration and assumed senior positions. The last report of the Administering Authority (1966-1968) sets out their employment at independence.

66. The 1962 Visiting Mission considered the time had come for a Legislative Council, but recognised that before this occurred there should be full consultation with the Nauruan people. Subsequently, the Nauruans, having rejected resettlement, pressed in 1964 for such a Council as a transitional step leading to independence in 1967. Between October 1964 and February 1965 Australian policies toward Nauru underwent a fundamental change. This followed these Nauruan representations, discussions at the United Nations and changes in personnel. In essence, the Australian Government decided to propose to the Governments of the United Kingdom and New Zealand that further discussions proceed with the Nauruans with the object of establishing in 1965 a Legislative Council with majority Nauruan representation, self determination in about 1970, increased royalties and an offer of an eventual partnership in the phosphate industry in which the Nauruans would receive not less than an equal share of the financial benefit.

67. From 7-9 April 1965 officials from the three Partner Governments met to work out an agreed approach which, following the formal agreement of the three Governments, comprised:

- an early offer of a Legislative Council in 1965 with wide powers in internal affairs (but excluding defence, external affairs and the phosphate industry) and an Administrator's Council;

- consultation with the Nauruans in 2 or 3 years on the possibility of further movement towards greater Nauruan executive responsibility;

- resumption of royalties discussions with an offer of a higher rate than that refused in July/August 1964;

- negotiations on the phosphate industry including some form of partnership; and

- the concept of resettlement be kept alive both in international discussion and elsewhere.

68. As a result of discussions in Canberra in June 1965 with Nauruan representatives it was agreed that a Legislative Council and Executive Council were to be established. The former was to have an elected Nauruan majority and wide powers excluding only defence, external affairs and the phosphate industry. An Advisory Committee was established consisting of Nauruan representatives (Head Chief Hammer DeRoburt and Councillor Bernicke with Mr K E Walker as adviser) and Australian officials to advise on the establishment of the proposed Legislative and Executive Councils. The recommendations of the Committee were approved by the NLGC and the Partner Governments. Before legislation could be introduced into the Australian Parliament to provide for the new arrangements, however, it was necessary for amendments to be made to the Nauru Agreements of 1919 and 1923 between the Partner Governments which provided for the administration of Nauru. These amendments were effected in the Nauru Agreement signed in Canberra on 26 November 1965 by the three Partner Governments (Annex 30, Vol.4, NM). Subsequently, legislation was introduced in the Australian Parliament in early December 1965. On 18 December Act 115 of 1965 to provide for the Government of the Territory of Nauru received assent (Annex 39, Vol.4, NM). The Legislative and Executive Councils commenced to operate in 1966.

69. After the future of the phosphate industry was settled in 1966 and 1967 attention again reverted to political advancement. This time the focus was independence. A Working Party on political matters was set up on 15 June 1967. It comprised Professor Davidson,[1] as the Nauruan representative, and Australian officials. It met eight times. The two delegations met in formal session as part of the 1967 negotiations on 23 August and Head Chief DeRoburt read a statement

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[1] Professor Davidson was constitutional adviser to the Nauruans.. He was Professor of Pacific History at the Australian National University and was earlier involved as constitutional adviser to Western Samoa.

in which he again rejected associated status, but indicated a willingness to discuss full independence and a treaty relationship with Australia, although such a treaty would not have the all embracing character of that earlier proposed by the Partner Governments. He affirmed that there should be no encroachment on Nauruan sovereignty.

70. On 18 October 1967 the Nauruan delegation was informed by Mr Barnes, the Minister for Territories, that the Partner Governments agreed to meet the Nauruan request for full independence. The other points conveyed related to the timing of independence, the transition arrangements and the termination of the Trusteeship Agreement. On 24 October 1967, with the agreement of Head Chief DeRoburt, Mr Barnes made a lengthy statement in the House of Representatives in Canberra announcing the decision (Annex 8 to Preliminary Objections). It incorporated a joint statement subscribed to by the representatives who took part in the talks. The text read in part:

> "Discussions on the constitutional future of the island of Nauru have been proceeding between representatives of the Nauruan people and of the three Governments - Britain, New Zealand and Australia - which are at present responsible under United Nations Trusteeship, for the administration of the island. ... The conclusions reached in those discussions are recorded in a joint statement subscribed to by the representatives who took part in the talks. The text of the statement is:
>
>> "Discussions between representatives of the Nauruan people and representatives of the Governments of Australia, Britain and New Zealand on the constitutional future of Nauru were recently resumed.
>>
>> At the earlier discussions held in June this year proposals by the Nauruan delegation seeking the agreement of the partner governments to Nauru becoming an independent state on 31st January, 1968 were considered. At that time the Governments agreed that it was appropriate that basic changes should be made in the government of Nauru but they put forward for consideration alternative arrangements under which Australia would exercise responsibilities for external affairs and defence but which would otherwise give the Nauruans full autonomy.

> ...
>
> The position of the Nauruan delegation was however, that the nature of the future links between Nauru and the three countries which were now the Administering Authority should be determined by agreement after independence had been attained. The primary objective of the Nauruan delegation was the attainment for Nauru of full and unfettered sovereignty.
>
> The partner governments responded that they would respect the views put forward by the Nauruan Delegation. The partner Governments were therefore agreeable to meet the request of the Nauruan delegation for full and unqualified independence.
>
> The date on which Nauru will become independent requires consideration in the light of the steps that are necessary to enable the change to be made. The partner Governments have agreed to take the necessary steps to seek from the present United Nations General Assembly a resolution for the termination of the trusteeship agreement upon independence being achieved.
>
> ...
>
> The agreement that has been reached is an historic one and is of far reaching importance to the Nauruan people. The choice of full independence is theirs. We wish them well. If after independence the Nauruan Government wishes to continue close links with Australia, as forecast by the Nauruan delegation at these talks, the Australian Government will be ready to respond and to consider sympathetically any requests that may be made for assistance.
>
> ...."

From October 1967 to January 1968 most Nauruan and Australian energies went into the transitional administrative arrangements, the establishment and deliberations of a Constitutional Convention to draft and approve the permanent constitution and elections for the Legislative Assembly.

71. On 10 November 1967, after short debates in both the Australian House of Representatives (26 October) and the Senate (2 November), the *Nauru Independence Act 1967* was adopted. It provided, *inter alia*, that "on and after Nauru Independence Day, Australia shall not exercise any power of legislation, administration or jurisdiction in and over Nauru" (Annex 40, Vol.4, NM).

Section II: Social advancement

72. In the immediate postwar period the major effort of the BPC went into reconstruction of the phosphate installations. It was not until 1949 that phosphate production substantially increased and only in 1950 did exports surpass the prewar level of 932,100 tons in 1939. The extent of the devastation wrought by the war was described in the report of the first (1950) United Nations Visiting Mission (Annex 7 to Preliminary Objections):

> "11. ... Nauru was one of the Territories hardest hit by the last war. All buildings and installations on the island were destroyed without exception ....
>
> 12. The problems of material rehabilitation facing the Australian authorities after their reoccupation of the island must have been considerable, especially as there were shortages of building material and labour, not only in Nauru, but also in Australia itself and other territories under its control. Even now, when facilities have been largely restored, much of the effort of the Administration is still concentrated on reconstruction.
>
> 13. The problems involved in restoring the morale of the Nauruan community have been no less considerable, but here also a large measure of success has been achieved. The Nauruan population is once again rapidly increasing. Nauruans are once again planning for the future... ."

73. The Administration, in co-operation with the BPC, restored the Island's social infrastructure. This included the construction in the late 1940s of 250 new houses for the Nauruans. This was funded by the BPC in additional royalty payable over fifteen years to the Administration (Visiting Mission Report 1950, p.14). Once the devastation of war was overcome, attention turned to social advancement.

74. Social progress, particularly in education and health, may be measured from the annual reports on the administration of the Territory made by the Administering Authority to the United Nations and by noting the comments of the six United Nations Visiting Missions.

75. At 30 January 1968 the total Nauruan population was 3,065 (1607 males, 1458 females) compared with 1369 at 31 December 1946; ie the population had more than doubled. At independence 1549 were in the age bracket 0-14 and 1051 between 5 and 14. At 30 January 1968, 1191 Nauruan pupils were being educated both in co-educational Administration and Sacred Heart Mission Schools at primary and secondary levels. Education, in accordance with Nauruan wishes, was compulsory for Nauruan children from 6 to the end of the school year in which they attained 16. For European children it was between 6 and 15. Secondary school courses, which involved four years' study, led to the Intermediate Examination conducted by the University and Schools Examination Board of the State of Victoria in Australia. The 1966-68 Administration report (p.39) noted that a system of scholarships and other forms of assistance provided secondary, technical and higher education and vocational training at overseas institutions, mainly in Australia, for children who reached the required standard. At 30 June 1967 there were 105 students and trainees studying overseas, of whom 77 were financed by the Administration and 28 were financed privately. Two were studying in Papua and New Guinea and the rest in Australia. Approved training establishments included universities, technical colleges, secondary schools and other institutions which provided vocational training such as nursing, dressmaking and hairdressing.

76. The 1965 United Nations Visiting Mission, the last before independence, commented, *inter alia*, on the educational system in these terms (paras.54-57, Annex 12, Vol.4, NM).

> "54. The Mission visited most of the schools on the island and was very favourably impressed with the standards maintained, the facilities provided and the quality of teachers, buildings and equipment.
>
> 55. The educational system provides for free, compulsory education and, in so far as the indigenous people of the Trust Territory are concerned, has as its objectives: (a) the provision of the means by which each child shall have the opportunity at all relevant ages of obtaining an education comparable in syllabus, content

> and standards with that available in Australia; (b) the attainment of a literate population with graduates in the arts, sciences and trades sufficient to meet the future needs of the Nauruans.
>
> 56. The extent of the achievement of these objectives may be gauged by the following figures:
>
> | Nauruan students in Australia | |
> |---|---|
> | (a) At universities | 5 |
> | (b) At technical colleges | 4 |
> | (c) In teacher-training colleges | 3 |
> | (d) Nurses in training | 2 |
> | (e) At secondary schools (58 scholarships, 7 private) | 65 |
> | | 79 |
>
> | Nauruan students in Nauru | |
> |---|---|
> | (a) At primary schools | 791 |
> | (b) At secondary schools | 251 |
> | (c) At the teacher-training centre | 15 |
> | (d) Enrolled in adult education class | 73 |
> | | 1,130 |
>
> 57. In considering these figures it must be remembered that over half the Nauruan population is under twenty years of age and that the 118 Chinese and Pacific Islands children at school only remain for short periods in Nauru."

77. A similar picture is shown in the reports on the Department of Public Health. It maintained a general hospital at which all treatment was free. (The 1965 United Nations Visiting Mission commended "the excellent services it provided to the community", para 80). The BPC in addition maintained a well equipped hospital for their employees. The Administration bore the cost of sending patients in need of specialist care, not available on Nauru, to Australia for treatment. In addition measures were undertaken on environmental sanitation, immunisation and health education. Nutrition was a special priority. The last (1966-68) Administration report noted (p.36) that the Nauruan diet showed considerable improvement, attributable to the greater diversity of food available, the general advancement in social and economic conditions and the

effects of health education; and that no cases of vitamin deficiency were seen during the period under review.

78. Some nine years before, the 1959 United Nations Visiting Mission had commented (para.62, Annex 10, Vol.4, NM) that:

> "on the whole, the Mission was very favourably impressed by the medical facilities provided and the measures taken by the Administration to care for the health of the people, as well as its program for the training of Nauruan men and women to assume eventual responsibility in all sections of the public health field."

79. At 30 January 1968, nine years later, this last point of greater Nauruan responsibility was illustrated by the fact that 96 Nauruans were employed in public health of whom six were medical practitioners, 36 were nurses (men and women) and 10 were nursing aides.

80. Throughout the Trusteeship, the United Nations expressed satisfaction with the Administering Authority. Thus in 1961 the Report of the Trusteeship Council:

> "notes with satisfaction the progress made in the Territory during the year under review in various fields, through the efforts of both the Administering Authority and the Neuruan people, particularly in the field of public health, social security and welfare services." (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 16th Session*, Suppl. No.4 (A/4818), Part II, Ch.VI, para.1.)

81. Similarly, in the final 1967 Trusteeship Council Report on Nauru, it is said:

> "The Council notes that relations between the Administering Authority and the representatives of the Nauruan people continue to be cordial; that economic, social and educational conditions continue to be satisfactory; and that commendable progress has been made in the Territory." (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 22nd Session*, Suppl. No.4 (A/6704) Part II, para.310; Annex 28 to Preliminary Objections.)

CHAPTER 3

PUBLIC FINANCE AND ROYALTIES UNDER THE TRUSTEESHIP

Section I: Public finance

82. The Nauruan Memorial refers to the system of public finance on Nauru and the fact that Australia did not contribute any funds of its own to provide for the administration of Nauru (NM, paras.364-373). It fails to mention that the Nauruan community was not called upon to pay income tax at any stage during the Trusteeship. Nauru alleges that the system of public finance administered by Australia during the Trusteeship involved a failure to exercise the degree and form of governmental authority in Nauru appropriate to the fulfilment of the obligation of trusteeship (para.365). The legal basis of this contention is examined in Part II, Chapter 4 below. The following paragraphs provide information on the system of public finance which show that there is absolutely no basis for Nauru's complaints concerning that system. One important feature of that system, as mentioned already, was the fact that the Nauruan people were not at any time subject to income tax.

83. To assist its annual review of Nauruan administration the Administering Authority regularly gave the Trusteeship Council information on the source of funding for the Territory administration. In the Trusteeship Council report for 1958-9, the position was summarised thus:

> "All expenses of the Administration are met by the British Phosphate Commissioners, out of the proceeds of phosphate sales, if not provided for by other revenue. Further revenue is obtained from import duties, postal services and other sundry items. There is no direct taxation, although the Nauru Local Government Council has certain powers to levy taxes which it has not yet exercised." (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 14th Session*, Suppl. No.4 (A/4100 p.160.)

84. This position remained generally true for the whole of the Trusteeship period. In the early years of the Trusteeship some concern was expressed that certain public expenditure was charged against the Nauruan Royalty Trust Fund. There were also suggestions that the capitation tax should be replaced by an income tax. Under this tax, each male person between 16 and 60 was required to

pay an annual tax: for Nauruans, 15 shillings, for Chinese, 20 shillings and for Europeans, 40 shillings.

85. The Administering Authority responded to these concerns. The capitation tax was abolished in 1951 to the satisfaction of the Trusteeship Council (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 17th Session*, Suppl No.4 (A/2150) p.261. No substitute tax was imposed. And in March 1952, there were a number of changes made to public finance as a result of which only certain Local Government Council expenditure was to be met from the Nauru Royalty Trust Fund. From 1 July 1952, the BPC were required to pay to the administration a sum equal to the whole estimated annual expenditure of the administration, to the extent not met by other revenues. This took the place of the previous 1s royalty on each ton of phosphate exported (a royalty separate from royalties paid to or for the benefit of the Nauruans). At the same time, education and some other administration expenses previously paid out of the Nauru Royalty Trust Fund were to be charged to the Administration Account (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 9th Session*, Suppl. No.4 (A/2680) p.272). The Trust Fund was then made available for expenditure by the Local Government Council, subject to the approval of the Administration.

86. The financial arrangements introduced in 1952 led some members of the Trusteeship Council to express concern that BPC would acquire too much influence over the budget for the Territory. In its 1957 Report the Council suggested that the Administering Authority might review the position (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 12th Session*, Suppl. No.4 (A/3595) p.202). The Administering Authority informed the Trusteeship Council that it had considered the possibility of changing the system, but considered the system was in the Territory's best interest (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 13th Session*, Suppl. No.4 (A/3822) p.98). The Council did not pursue the issue. Attention instead was given to the issue of royalties.

Section II: Royalties and trust funds

87. As Nauru itself recognises (NM, paras.371-372), a major issue in trusteeship discussions was the rates of royalty paid for the benefit of the Nauruans rather than the public finance system itself. Throughout the 20 year period from 1947 to 1967, the BPC paid royalties to Nauruans, which were substantially increased from time to time. Thus, adjustments were made in 1947,

1950, 1953, 1957, 1960, 1964, 1966 and 1967 following negotiations between the Nauruans and the BPC. In the three years preceding independence, rates became increasingly a matter directly dealt with by the Partner Governments and the NLGC representatives. Royalty payments were made in addition to adjustments needed to meet administration costs. The latter, under Article 2 of the 1919 Nauru Agreement, were to be defrayed out of the proceeds of the sales of the phosphate so far as they were not met by other revenue.

88. The first postwar agreement concluded on 23 May 1947 between the Nauruan landowners, the Administration and the BPC provided that the following royalties should be paid: 6d for the landowner, 3d to the Nauruan Royalty Trust for the benefit of all Nauruans, 2d for the Landowners Investment Fund and 2d for the new Long Term Community Investment Fund (Report of the Administering Authority for the period 1 July 1948 to 30 June 1949, pp.34-35). This was a total of 13d compared to 8d paid at the start of World War II.

89. The royalties paid to or for Nauruans during Trusteeship were paid in the following ways:

a. *The Nauru Landowners' Royalty Trust Fund.* This was established in 1927 by agreement with the Nauruans. Royalties were paid into the fund every six months on behalf of the landowner whose land was being worked and invested by the Administration for 20 years. Until the mid 1950s only interest on matured investment was paid to the landowners and the capital reinvested. From 1955 the investment period was reduced to 15 years and the capital was also distributed along with the interest as the investment matured. At 30 June 1967 the total amount invested in the fund was $A3,022,607 (in 1993 values, $A21 million).[2]

b. *Royalty paid direct to landowners.* Individual landowners were paid a cash royalty at the rate agreed from time to time. For the year ended 30 June 1967 an amount of $A701,954 was paid (in 1993 values, $A4.9 million).

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[2] In order for values from 1967 to reflect 1993 values using the Australian GDP deflator, they need to be multiplied by seven. This is the method used in this Counter-Memorial.

c. *The Nauru Royalty Trust Fund*, instituted in 1927, provided additional funds for amenities and services to the Nauruans. It was mainly used from the 1950s on to fund the activities of the NLGC and some educational activities. During the year ended 30 June 1967 payments amounted to $A307,774 (in 1993 values, $A2.1 million).

d. *The Nauruan Community Long Term Investment Fund*, was established in 1947 to provide for the economic future of the Nauruan people when the phosphate was exhausted. At 30 June 1967 the fund amounted to $A6,241,719 (in 1993 values $A43.4 million).

90. Paragraph 124 of Volume 1 of the Nauruan Memorial says that:

> "rather less than 50% of the Royalties 'paid to Nauruans' were paid direct to the landowner; in the subsequent fifteen years that figure was reduced to about 20%. The remainder of the moneys paid by way of royalty 'to Nauruans' were paid to funds invested and controlled by the Australian Administration."

It must be emphasised that those funds were invested for the benefit of the Nauruan people. This reflected the wishes of the United Nations who supported the various royalty increases, but indicated their preference that the benefits go principally to the Nauruan Long Term Investment Fund, not to the individual landowners (see eg United Nations, *Report of Trusteeship Council, General Assembly Official Records, 11th Session*, Suppl. No.4 (A/3170) p.334). The Funds were continued by the Nauruan Government after independence.

91. The relevance to the various Nauruan claims of the amount paid in royalties is discussed below in Part II. A brief review of what actually occurred throughout the trusteeship is provided here.

92. Royalty rates rose significantly in the few years before independence. This reflected a changing appreciation by the United Nations, Nauru and the Administering Authority of what was an appropriate basis for the calculation of royalties. The experience of Nauru in relation to the phosphate concession was no different from that elsewhere in the world at this time in relation to many other mining concessions. This period saw the start of a world wide era of renegotiation, and in some cases nationalisation, of foreign mining concessions.

The legal significance of this situation is developed later on in this Counter-Memorial.

93. Apart from the period immediately before independence, a review of the royalties paid for Nauruans during the Trusteeship discloses a gradual increase particularly in payments to the Nauruan Community Long Term Investment Fund. In 1948 the total royalties paid were 1s1d. This increased in 1950 to 1s.4d, 1955 to 1s.6d, 1958 to 1s.7d, 1959 to 2s.7d, 1961 to 3s.7d, 1963 to 3s.8d, 1965 13s.6d, 1966 17s.6d, and 1967, $4.50.[3]

94. As total export tonnage increased from the early 1960s from roughly 1.2 m tons to 1.6 m tons, and the life of the phosphate mining industry was gradually reduced, the Administering Authority ensured that the royalty payments by BPC increased. The United Nations itself welcomed this gradual increase.

95. In the early 1950s, the Administering Authority stated that royalties were established having regard chiefly to the current and future needs of the Nauruan population. They were not calculated simply as a percentage of the export price of phosphates. That is, the basis for royalties payments was not the price at which phosphates were sold, but the needs of the Nauruan people: see United Nations, *Report of Trusteeship Council, General Assembly Official Records, 7th Session*, Suppl. No.4 (A/2150) p.261. In subsequent years, the Trusteeship Council and Visiting Missions expressed some sympathy with the Nauruan wish to receive higher rates of royalties, although it made no specific recommendations to that effect.

96. Thus, the Council's Report for 1955:

> "notes that the efficient development of the phosphate deposits is of basic importance to the Territory's economy and that the policy adopted by the Administering Authority has resulted in relative prosperity for the Island and its inhabitants. The Council nevertheless emphasises the need for ensuring that the Nauruans receive the maximum benefits from the exploitation of the Island's resources." (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 10th Session*, Suppl. No.4 (A/2933) p.224.)

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[3] In 1966 Australia adopted decimal currency whereby one pound became the equivalent of two dollars.

97. In 1956 the Visiting Mission indicated that the desire for higher royalties "deserves sympathy and consideration" and that a "spirit of understanding and appreciation should always guide the adjustment of royalty rates" (Annex 9, vol.4, NM, paras.87 and 89). The Visiting Mission and Trusteeship Council were then concerned that royalties be applied to building up an adequate fund to meet the cost of plans for the future well-being of the community. Australia agreed with this view (United Nations, *Trusteeship Council Official Records, 18th Session*, Doc.T/SR.717, p.133-4).

98. The phosphate return received by Nauruans was fully disclosed. In 1956 the Special Representative for the Administering Authority said:

> "The annual report showed the quantity of phosphate exported from Nauru, the fob price paid for it - from which, as the Guatemalan representative had demonstrated (717th meeting), the sale price per ton could easily be calculated - the royalties paid per ton, and other figures which together indicated that part of the value per ton which the Nauruans received in direct or indirect benefits. The remainder was accounted for entirely by operating expenses, which were not all recorded in the annual report, and it was the details of those expenses which the Administering Authority did not feel called upon to reveal. Such information could not reveal profits, for there were none; the phosphate was sold at cost and the cost was the sum of the benefits received by the Nauruans and the working expenses.
>
> To decide whether the Nauruans were getting substantial benefits from the phosphate industry it was necessary to assess the benefits they received in the form of employment, free education, free health services, free housing subject to cost only of maintenance, land rents, direct royalty payments, deferred royalty payments, trust funds and direct financing of almost the entire cost of the Territorial government and the local government administration." (*United Nations, Trusteeship Council Official Records, 18th Session*, Doc.T/SR.720)

99. In 1957 Australia estimated that one-fifth of the cost of phosphate went directly or indirectly to Nauruans themselves (837th meeting, TC). In 1958 India estimated that the figure was 19%, almost the same as the Australian estimate of the previous year. Between 1959 and 1961 the Trusteeship Council sought more comprehensive information, so that it might better assess the equitableness of the royalty rates. As a result, additional information on royalty negotiations was

given to it by the Administering Authority. At the same time, royalty rates were increased, a fact commended by the Council which also expressed the view that those increases should be applied to the Long Term Investment Fund.

100. In its 1959 Report the Council concluded:

> "The Council notes with satisfaction that, consequent on an agreement reached in 1958 between the Nauru Local Government Council and the British Phosphate Commissioners, increases in the royalty and acreage payments were made retrospective from 1 July 1957 and that, in accordance with the policy endorsed at its twenty-second session, the proceeds were applied mainly to the Nauruan Community Long-Term Investment Fund.
>
> The Council, noting that general discussions on royalty rates were held in Canberra in April 1959, between the British Phosphate Commissioners and representatives of the Nauruan community and of the Department of Territories, hopes that the outcome of the discussions will be satisfactory to the Nauruans, commends the Administering Authority for directly associating representatives of the Nauruan community in a matter which so closely affects their well-being and requests the Administering Authority to inform it of the results of the discussions and to provide it with more comprehensive information on the operations of the British Phosphate Commissioners." (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 14th Session*, Suppl. No.4 (A/4100) p.160.)

101. And in 1960, the Council said:

> "The Council commends the Administering Authority for the increase in the royalty rate paid direct to landowners.
>
> The Council notes the statement of the Administering Authority that the general review of royalty rates begun last year has reached the stage where the submissions of the British Phosphate Commissioners and of the Nauru Local Government Council are now being examined. The Council requests the Administering Authority to furnish it with appropriate information regarding the views submitted by the two parties in order that it may reach a better understanding of the matter.

> The Council reiterates the view that any increases resulting from this review should be applied mainly to the Nauruan Community Long-Term Investment Fund.
>
> The Council, believing that the information provided to it concerning the operations of the British Phosphate Commissioners in Nauru does not enable it to express a considered opinion on the equitableness of the royalty rates being paid, reiterates its recommendation on this subject adopted at its twenty-fourth session that the Administering Authority provide it with more comprehensive information." (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 15th Session*, Suppl. No.4 (A/4404) p.155.)

102. The 1962 Visiting Mission carefully examined the royalties and increases in benefits received by Nauru (see Annex 11, NM). The Report concluded that "since the Trusteeship was concluded the percentage benefit to the Nauruans against the value of phosphate at the point of exports has risen from just under 4 per cent to 24 per cent (para.111). They commented further that "the current benefits enjoyed by the Nauruans (to the value of 24 per cent of the export value of the phosphate) are substantial" (para.114). The 1962 Trusteeship Council report said:

> "Noting from the report of the Visiting Mission that the rate of royalty derived by the Nauruan people from the phosphate has been increasing over the years, the Council takes note of the statement of the special representative of the Administering Authority that the matter of increasing returns from the phosphate operations is a matter for continuing negotiation between the Nauruans, the British Phosphate Commissioners and the government of the Territory. The Council is confident that as a result of those negotiations, fair and adequate benefits for the Nauruans will be arrived at." (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 17th Session*, Suppl. No.4 (A/5204) p.41)

103. The 1963 Trusteeship Council Report adopted a similarly restrained approach. In that year, Chief DeRoburt had complained about the unfairness of the royalty return even though the Administering Authority had pointed out that 24% of the phosphate return was received by the Nauruans. The Council did no more than note Chief DeRobert's complaint together with the Administering Authority's response, although it did raise the possibility of some local Nauruan

equity in the BPC (United Nations, *Report of Trusteeship Council, General Assembly Official Records 18th Session*, Suppl. No.4 (A/5504) p.28). This reflected the growing interest in such issues and in doctrines like permanent sovereignty over natural resources. Consistently with this, from 1963 onwards, the pace of change in Nauru quickened. Royalties were again substantially increased and ultimately the whole phosphate industry was transferred to Nauru. This is covered in more detail elsewhere in this Counter-Memorial (see Part I, Chapter 5). It underlines the continually evolving position in Nauru. It is incorrect to suggest as Nauru does that the BPC was inflexible and the Administering Authority not mindful of the interests of the Nauruan people.

104. In 1965 the Nauruan leaders again complained to the Visiting Mission about the adequacy of royalty rates, a fact simply noted by the Mission which expressed the hope:

> "that the two parties will come to an agreement about increased royalties, and believes there would be great advantage if the major part of any such increases were to be placed in the Nauruan Community Long Term Investment Fund, where it would serve to help assure the future of the entire Nauruan community." (para.49, Annex 12, NM.)

105. Again, however, the Trusteeship Council in 1965 acknowledged the significant increases in royalty rates resulting from the 1965 negotiations. The Council adopted conclusions and recommendations that can only be described as positive and which endorsed the position of the Administering Authority. Thus the recommendation recorded that the Council "welcomes" the notable increase; and also "looks forward" to a report; "hopes" further negotiations will resolve a problem and "believes" every effort will be made to find a solution in conformity with the interests of the Nauruan. This is not a statement which indicated that the supervisory body was concerned with the adequacy of the reports made by the Administrative Authority or with its discharge of the trusteeship obligations in general. The full recommendation reads as follows:

> "The Council notes that at the Canberra Conference it was agreed to increase the phosphate royalty rates for 1964-65 to 13s.6d and for 1965-66 to 17s.6d; to fix for 1965-66 an extraction rate of 2 million tons of phosphate; to establish at the earliest practicable date an independent technical committee of experts to examine the question of rehabilitating the worked-out mining land on Nauru; and to discuss the

> future arrangements for the operation of the mining industry which would include some form of joint enterprise.
>
> The Council, noting the recommendation of the 1965 Visiting Mission that account should be taken of the Nauruans' desire for more favourable terms in the apportionment of profits from the exploitation of the phosphates, welcomes the notable increase in royalty rates.
>
> Noting the agreement on a slightly higher extraction rate for 1965-66, without prejudice to the Nauruan position in any subsequent negotiation, the Council urges that agreement should be reached between the representatives of the Nauruan people and the Administering Authority on an extraction rate for future years on a basis that will safeguard the future interests of the Nauruan people.
>
> With regard to the future arrangements for the operation of the mining industry, the Council hopes that this problem will also be resolved to the full satisfaction of the Nauruan people.
>
> The Council looks forward to the report of the expert committee on the question of the rehabilitation of the worked-out mining land; it requests the FAO to consider favourably the invitation to make available a representative to serve on this committee.
>
> The Council notes that in relation to the ownership of phosphates at Nauru, the representatives of the Nauruans maintained their position that the British Phosphate Commissioners could not validly work the phosphate on Nauru without the agreement of the Nauruan people, while the Australian delegation restated the view of the Partner Governments that the rights were legally vested in the British Phosphate Commissioners. The Council hopes that the forthcoming negotiations between the representatives of the Nauruan people and the Administering Authority will resolve this problem. The Council believes that every effort will be made to adopt a solution in conformity with the interests of the Nauruan people." (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 20th Session*, Suppl. No.4 (A/6004) pp.49-50.)

106. The supervisory function of the Trusteeship Council is emphasised by the character of its recommendations throughout the reporting period. Thus, where

the Council recommended higher royalty payments, it also usually recommended that any such increases should be placed in the Long Term Investment Fund. Australia concurred with this view. In 1958, for instance, the Council endorsed the policy of the Administering Authority that any increase should apply mainly to the Nauruan Community Long Term Investment Fund (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 13th Session*, Suppl. No.4 (A/3822) para.62). The 1965 Visiting Mission adopted a similar approach (para.49). The United Nations recognised the need to make adequate provision for the long term future of Nauru, as did the Administering Authority.

107. As an examination of the 1967 phosphate settlement and the financial position of Nauru indicates, the well-being of the Nauruan people was carefully ensured.

Section III: Reporting to the United Nations on BPC

108. Closely related to United Nations consideration of public finance and royalties was the issue of the role of the BPC. Nauru has alleged that Australia, on behalf of the Administering Authority, failed to supply adequate information on the phosphate industry to the United Nations (NM, paras.284, 314-321, 334-354). This allegation is discussed in Part II Chapter 4. The facts relating to it are set out below.

109. The United Nations was fully cognisant of the financial position concerning the phosphate industry both before and at the time of the termination of the Trusteeship. Throughout the reporting period Australia, as indicated above, provided information on the quantum of royalties and the funds to which they were paid, as well as information on the moneys contributed by BPC to the cost of administration of Nauru. This was set out in detail in each of the annual reports of the Administration to the Trusteeship Council. The accounts of BPC were annexed each year to those reports. The records of the Trusteeship Council show that the Council regularly examined the information provided as part of its consideration of the adequacy and distribution of the royalties. The Trusteeship Council annual reports regularly note the volume of phosphate exported, its value and the royalty payments. Visiting Missions also considered these questions: see for instance, the detailed examination of financial information in the 1962 Visiting Mission Report, paragraphs 96-115; reproduced in Annex 11, Vol.4, NM.

110. From time to time, prior to 1963, the Trusteeship Council called for greater information on the royalty question (see paras.95 to 103 above) and their concern to have adequate financial information is an excellent illustration of the effectiveness of the supervisory machinery of the United Nations in relation to the trusteeship system. As a result of those calls by the Trusteeship Council, the Administering Authority sought to provide increased information. Further, on the Council's recommendation, regular annual consultations between Nauruan representatives and the BPC were commenced and the Nauruan delegation was given access to professional advisers; and in accordance with calls for sympathetic consideration of Nauruan demands for higher royalties, the royalty rates were gradually increased. Moreover, Nauru concedes that the Council did not repeat its recommendations for greater information after 1963 (NM, para.353). This fact presumably meant that the need had been met, by the appropriate response of the Administering Authority. Certainly, the reports of the Council contain no finding that the Administering Authority was acting contrary to its obligations.

111. Further, the Trusteeship Council's early concern about the sufficiency of information, and the adequacy of royalty rates was later replaced with a concern about the negotiating process. In later years, the Trusteeship Council was primarily concerned that Nauruan representatives be given reasonable opportunity to be involved in the setting of royalty rates and in decisions involving the phosphate industry.

112. Thus the 1962 Visiting Mission recommended annual meetings between representatives of the BPC and Nauruan elected representatives. The first such meeting took place in November 1963. The Trusteeship Council in its 1964 Report expressed the view that:

> "The Council is confident that this initial contact between the representatives of the Nauruan Local Government Council and the British Phosphate Commissioners will lead to a mutual understanding and a better and closer co-operation between the parties concerned... . The Council reiterates its belief that further consultations between representatives of the British Phosphate Commissioners and the Nauruan elected representatives will be instrumental in ensuring the equitable sharing of the proceeds of phosphate mining." (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 19th Session*, Suppl. No.4 (A/5804) para.249.)

In subsequent years there were of course detailed negotiations between Nauruan representatives and Partner Governments over phosphate mining issues, including royalty rates. A description of these are set out in Chapter 5 below.

113. The Nauruan Memorial purports to set out the attitude of the Australian representative in 1953, 1956 and 1958 as to the provision of information concerning the accounts of BPC (paras.543-545). However, these statements are quoted in isolation and fail to disclose the quantity of significant information on BPC activities in fact provided to the Trusteeship Council by the Administering Authority. In each Annual Report the balance sheet and accounts of BPC were included. This indicated the fob price paid for phosphate and the volume of phosphate exported from Nauru. What the accounts did not detail was the cost of BPC's operations on Nauru as distinct from those on Ocean Island, also conducted by BPC. It was this that prompted the Trusteeship Council in 1954 to request the Administering Authority to make every effort to provide information concerning the separate financial operations of the BPC in respect of Nauru in its next annual report. This followed an Australian statement that there were no separate BPC accounts in relation to Nauru.

114. In 1955 the Council adopted the following recommendation:

> "The Council recalls its previous recommendations to the effect that the Administering Authority should make available to it separate financial accounts in respect of the operations of the British Phosphate Commissioners in Nauru. The Council takes note of the replies to these recommendations given by the Administering Authority indicating the difficulties which it perceives in complying with them, and expresses the desire that the Administering Authority in its next and subsequent reports will provide the Council with the fullest information feasible on the phosphate operation in the Island." (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 10th Session*, Suppl. No.4 (A/2933) p.225.)

115. In response, the Administering Authority submitted additional information on the phosphate mining operations. This prompted a recommendation in 1957 as follows:

> "The Council, noting that proposals made by the Nauru Local Government Council to increase the royalty rates on phosphate are now being considered, noting further that the Administering Authority

> is currently submitting information on the operations of the British Phosphate Commissioners, considering on the other hand that full information on the operations of the British Phosphate Commissioners as specifically related to the island of Nauru would be of great assistance to the Council for its assessment of the question, recommends that the Administering Authority submit such information to the fullest extent feasible." (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 12th Session* Suppl. No.4 (A/3595) p.202.)

116. The position of the Administering Authority was as follows:

> "With regard to the subsidiary question of whether the Trusteeship Council received sufficient information about the operations of the British Phosphate Commissioners, the Administering Authority's position was clear. The Council was fully entitled to information concerning the quantity of phosphate produced on the island and its destination and value, and that information was submitted to the Council. It was to be found in appendix VII and appendix XIII of the annual report. The Administering Authority felt that in providing that information it was fully complying with Article 5 of the Trusteeship Agreement. The British Phosphate Commissioners operated not only in Nauru but also in Ocean Island and Christmas Island, which were not the concern of the Trusteeship Council, and it would be impracticable to present completely separate information relating to Nauru phosphate alone. The Administering Authority could not emphasise enough its belief that the Council did not need such information and the disclosure of confidential accounts of the Commissioners in order to perform its task effectively. The royalty rates paid to or for the direct benefit of the Nauruans were in no way dependent on or influenced by the prices received for phosphate." (United Nations, *Trusteeship Council Records, 18th Session*, T/SR 714, p.112).

117. As Appendix 2 to the Nauruan Memorial makes clear, separate accounts for Nauru and Ocean Island operations have never been published by BPC. See Vol.I, NM, pp.268-279. As Nauru notes, in the confidential BPC reports, Ocean Island and Nauru accounts are presented on a combined basis (Vol.I, NM, p.268). The respective tonnages exported from the two islands were, however,

available. The Australian Government reserves its position on the accuracy of the attempt by Mr Walker for Nauru to estimate a separate fob price for Nauru phosphate (see Appendix 2, NM, pp.279-288).

118. Between 1959 and 1960 the Council again called for more comprehensive information on the BPC. On each occasion the Administering Authority stated that it would include information in its Report on the operations of BPC to the fullest extent possible. In the 1959 Report the special representative of the Administering Authority noted that BPC:

> "were responsible for development of the phosphate industry in other areas as well, much of their expenditure was in the form of common costs which it was not possible to break down without a complex and largely hypothetical system of costing analysis. The important thing was that the Nauruans were deriving substantive and increasing benefits from the operation of the phosphate industry." (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 14th Session*, Suppl. No.4 (A/4100) para.94.)

119. As already noted, the Trusteeship Council was principally concerned in the 1959-1961 period to have more information concerning BPC financial operations to assess whether the Nauruans were receiving an equitable share of benefits. After 1962 these calls needed to be made no longer as provision was made for regular consultations between BPC and the NLGC. As the Council said in 1964:

> "further consultations between representatives of the British Phosphate Commissioners and the Nauruan elected representatives will be instrumental in ensuring the equitable sharing of the proceeds of phosphate mining." (*United Nations, Report of Trusteeship Council, General Assembly Official Records, 19th Session*, Suppl. No.4 (A/5804) p.249.)

From 1965 to 1967 detailed negotiations took place on the future administration of the phosphate industry, which resulted in agreement on significantly higher royalties. These were reported to the United Nations and are examined in detail in Chapter 5 below.

CHAPTER 4

THE PROPOSALS FOR RESETTLEMENT AND REHABILITATION

120. Throughout the Trusteeship the Administering Authority was conscious of the need to address the long term future of Nauru, given that the phosphate deposits would one day be exhausted. A number of means to achieve this were considered. Initially this took the form of consideration of resettlement proposals, with United Nations endorsement and encouragement. At the same time, examination of the possibility of rehabilitation was also undertaken. When resettlement was rejected by Nauru a further examination of rehabilitation occurred. Alternative means to secure the Nauruans' future were adopted in the phosphate settlement. This ensured a viable and wealthy community at the time of independence as part of the comprehensive phosphate settlement. The significance of these events is examined below: see Part II, Chapter 2 and following. This Chapter examines the efforts of the Administering Authority in relation to resettlement and rehabilitation, and United Nations attitudes thereto.

Section I: Consideration of resettlement by the Partner Governments and the United Nations

121. Resettlement, as the long term solution to the problems which would be faced in the future by those living on a worked out island, was recognised as desirable by the Partner Governments, the Nauruans and the United Nations at an early stage. The 1953 United Nations Visiting Mission report said (para.13, Annex 8, Vol.4, NM) that "the Mission, without wanting to be dogmatic, is of the opinion that resettlement in some other location, as expressed by the Nauruans themselves, may be the only permanent and definite solution". In the following years a number of possible sites in and near Papua New Guinea were investigated by the Administering Authority, but none could meet the three requirements considered necessary: employment opportunities enabling the Nauruans to maintain their standard of living; a community which would accept the Nauruans; and willingness on the part of the Nauruans to mix with the existing people.

122. Having regard to Parts II and III of this Counter-Memorial, it is appropriate to deal with the question of United Nations consideration of resettlement of Nauruans and rehabilitation of the island together. Concern with resettlement and the rehabilitation of Nauru has a long history of consideration

in the Trusteeship Council, where the choice between resettlement or rehabilitation was regularly debated. This issue is dealt with in the Nauruan Memorial at paragraphs 561-591. The story of consideration of rehabilitation by the Partner Governments is set out in detail in paragraphs 142 to 170 of this Counter-Memorial.

123. The question of rehabilitation or resettlement was first raised in 1949, at which time Australia indicated that financial provision was being made for the time when the phosphate deposits would be exhausted in 70 years (United Nations, *Trusteeship Council Official Records, 5th Session*, T/SR.7). This took the form of the introduction of a component in the royalties, when adjusted in 1947, for a long term investment fund that could be used whether the Nauruans remained on Nauru or moved to another island.

124. The 1950 Visiting Mission commented that resettlement may offer the only long term solution unless research reveals some alternative livelihood (United Nations, *Trusteeship Council Official Records, 8th Session*, Suppl. No.3 (T/898) para.58; reproduced in Annex 7, Vol.4, NM). This was a widely shared view at the time. The issue of resettlement and rehabilitation was raised in discussion in the Trusteeship Council in 1951, 1952 and 1953 and concern expressed for the future of the island.

125. This was not because the working-out of the phosphate lands would deprive the Nauruans of land which was economically essential for their existence. On the contrary, the phosphate lands were - apart from their value as mineral deposits - of minimal economic relevance. The basic problem was rather that, given the increasing population and rising expectations as regards living standards, it was not thought likely that the island could accommodate the Nauruans long-term - whether or not the worked-out phosphate lands could be restored to some form of productive, agricultural use.

126. In 1951 the Trusteeship Council expressed the view that it "considers it advisable that studies of a technical nature should be carried out in order to determine the possibility of making use of worked-out phosphate land" (United Nations, *General Assembly Official Records, 6th Session*, Suppl. No.4 (A/1856) p.229). Yet the 1953 Visiting Mission said it "saw no other alternative to the resettlement of the population elsewhere" (United Nations, *Trusteeship Council Official Records, 12th Session*, Suppl. No.2, para.13; reproduced in Annex 8, Vol.4, NM). The Council itself in 1953 recommended that the Administering Authority formulate plans for resettlement in consultation with Nauruans; it

further recommended that the Administering Authority give consideration to the views of the Visiting Mission regarding the establishment of a capital fund for resettlement (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 8th Session*, Suppl. No.4 (A/2427) p.113). In 1954 this issue of rehabilitation or resettlement was again the subject of considerable discussion and the Council noted that the Administering Authority was studying plans for gradual resettlement (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 9th Session*, Suppl. No.4 (A/2680) p.265).

127. In 1955 the Council heard that Australia had investigated the possibility of resettlement on Woodlark Island, Papua New Guinea and that the search continued for suitable islands. The Council also suggested further consideration be given to the possibility of rehabilitation (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 10th Session*, Suppl. No.4 (A/2933) p.220). Australia also informed the Council that an expert study (by the CSIRO) had found that resoiling was "a practical impossibility". This report is Annex 14 to the Preliminary Objections and is discussed in more detail in paragraphs 142 to 146 below. Australia indicated that a need for resettlement was a consequence of improved living standards and likely population pressures, not phosphate mining itself (United Nations, *Trusteeship Council Official Records, 16th Session*, Doc.T/SR.613).

128. The 1956 Visiting Mission concluded on the basis of the CSIRO study that there was no practical possibility of the widespread utilisation of worked out phosphate land for agriculture, that it believed "there [was] no alternative to resettlement after the phosphate deposits [were] exhausted" (United Nations, *Trusteeship Council Official Records, 18th Session*, Suppl. No.4, para.51; reproduced in Annex 9, Vol.4, NM). The Council that year also recommended that the search for a site continue and supported a Visiting Mission recommendation that a standing joint body be created "so that there would be continuous consultations with Nauruan people, who would thus realise their share of responsibility for solving the problems of the future of the Nauruan community to a greater degree" (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 11th Session*, Suppl. No.4 (A/3170), p.325). Australia confirmed to the Council what it had already told the Visiting Mission, namely that the Administering Authority would bear the cost of any resettlement: in its report the Council "welcome[d] the assurance given by the Administering Authority that whatever funds will be needed for the possible

resettlement of the Nauruans, these funds will be forthcoming as and when required" (p.325).

129. Investigation of possible islands off Papua and New Guinea continued in 1957 and 1958. In 1959 the Visiting Mission, in light of failure to find suitable islands, recommended that "earnest consideration should be given to (the Nauruan community's) gradual integration into the metropolitan territory of one of the three Administering Authorities" (United Nations, *Trusteeship Council Official Records, 24th Session*, Suppl. No.4, para.24; reproduced in Annex 10, Vol.4, NM). The Council recommended that efforts continue to find a concrete solution. An attempt by India and Paraguay to seek inclusion of a recommendation in the Council Report that further examination be made of the possibility of rehabilitation was rejected 7:6 (United Nations, *Trusteeship Council Official Records, 24th Session* Doc.T/SR.1013).

130. On 12 October 1960 the Partner Governments, following discussions between themselves, offered permanent residence and citizenship in Australia, New Zealand or the United Kingdom to any Nauruans who wished "to transfer to those countries and are likely to be able to adapt themselves to life there" (Annex 4 to Preliminary Objections). It was envisaged that the transfer should take place gradually over a period of 30 or more years and that some material assistance to that end would be given. On 15 December 1960, the NLGC rejected the offer on the grounds that it did not afford them a new homeland and that, by its very nature, the proposal would lead to the assimilation of the Nauruans into the metropolitan communities where they settled. The NLGC instead asked for another island in a temperate zone (Appendix A, Annex I, 1962 UN Visiting Mission report, reproduced in Annex 11, Vol.4, NM).

131. The issue was again raised in 1960 in the Trusteeship Council, which recommended that rehabilitation issues be kept under active consideration (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 15th Session*, Suppl. No.4 (A/4404) para.61). Australia indicated at the time, however, that the CSIRO had informed them that there were no new developments that would lead them to alter the conclusions concerning rehabilitation previously reached.

132. In 1961 Australia provided details of the proposal endorsed by the three administering Governments to allow Nauruans to resettle in their countries referred to in paragraph 130. It was noted by the Council that the Nauruans were not yet prepared to accept those proposals as they "hope[d] that a place may be

found where they could continue to live as a separate community and retain their identity as Nauruans" (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 16th Session*, Suppl. No.4 (A/4818) Ch.VI para.18). The Council also called on the Administering Authority to obtain further technical advice on rehabilitation and to consider the establishment of a pilot project to assess the technical and economic feasibility of rehabilitation "bearing in mind the possibility that some Nauruans may decide to remain on the island in the event of the resettlement of the community elsewhere" (para.18). It appears that no pilot project was undertaken at this time. The 1962 Visiting Mission said:

> "settlement ... in a new home is unavoidable ... [N]o one who has seen the wasteland of coral pinnacles can believe that cultivable land could be established over the top of it except at prohibitive expense. Even a layman can see that, and it is to be noted that the suggestion for rehabilitation of the land has never come from anyone who has visited the island." (United Nations, *Trusteeship Council Official Records, 29th Session*, Suppl. No.2, para.65; reproduced in Annex 11, Vol.4, NM.)

133. The 1962 Visiting Mission concluded that, instead of looking for an island, a single community centre in Australia close to some centre of population might have been appropriate.

134. The 1962 Trusteeship Council report also said the time had come for specific and detailed plans for resettlement.

135. In early 1962 two Nauruan Councillors, one of whom was Head Chief Hammer DeRoburt, inspected islands in the Torres Strait and Fraser Island, which is close to Maryborough on the east coast of Queensland. In August 1963, the Australian Government following investigations from its specially appointed Director of Nauruan Resettlement and consultations with the United Kingdom and New Zealand Governments, offered the Nauruans Curtis Island close to Gladstone on the Queensland coast, with extended local government powers. This offer was ultimately rejected because the proposed political arrangements were unsatisfactory to the Nauruans. The Australian Government, for its part, had made it clear as early as April 1962 that for constitutional reasons any surrender of Australian sovereignty over any mainland or island location in Australia which might be identified for resettlement by Nauruans would raise grave difficulties.

136. While Australia was sympathetic to the Nauruan desire to retain their identity, it was not, however, able for constitutional reasons to cede part of one of its constituent states to form an independent nation, which would have been separated by only a very narrow channel from the Australian mainland. In the hope, nevertheless, that resettlement on Curtis Island on the terms proposed might be possible, Australia commenced negotiations to purchase land on Curtis Island.

137. At this time too the Nauruan Resettlement Sub-Committee of the NLGC submitted its first proposals which would involve the creation of a sovereign Nauruan nation related to Australia by a treaty of friendship. (This was still premised on resettlement outside Nauru.)

138. In 1963 Australia indicated to the Trusteeship Council that Curtis and Fraser Islands off the coast of Queensland had been investigated by Nauruans and found suitable, subject to agreement with Nauruans on the future form of government. Australia indicated, however, that it did not consider Fraser Island offered economic prospects and there were problems of water supply. Australia also indicated that although it could accept resettlement of Nauruans as a group on the islands, it could not relinquish sovereignty over the islands. DeRoburt, as an adviser to the Special Representative of Nauru, indicated that he did not think Nauruans would go back on the basic decision that they be resettled elsewhere (United Nations, *Trusteeship Council Official Records, 30th Session*, T/SR.1205).

139. Australia set out details of a resettlement scheme based on Curtis Island in its 1964 Report to the Trusteeship Council. The proposal would enable the Nauruans to manage their own affairs, the island constituting a distinct local government area. The Administering Authority would provide all the money necessary for resettlement. (For details see United Nations, *Trusteeship Council Official Records, 31st Session*, Doc.T/SR.1232.) But this proposal was rejected by Nauruan representatives in July 1964. This was due to the inability to agree on the degree of control to be accorded the Nauruan community.

140. In July and August 1964 discussions took place in Canberra between Australian officials led by the Secretary for Territories, and the NLGC, led by Head Chief DeRoburt, on the issues of resettlement, royalties, Nauruan independence by 1967, the rate of extraction and the ownership of phosphate (Annex 5 to Preliminary Objections). Dr Helen Hughes, an economist at the Australian National University, was present as an adviser to the Nauruans on

royalties. Little agreement was reached. On 20 August 1964, Mr Barnes, the Australian Minister for Territories issued a comprehensive statement which, *inter alia*, set out the differing positions of the Administering Authority and the NLGC on Curtis Island (Annex 6 to Preliminary Objections). Relevant extracts read:

> "For some years past it had been accepted by the Nauruan people, the Australian Government and the United Nations Trusteeship Council that resettlement of the Nauruans in another place was essential for a satisfactory solution to the problems which would confront them, when the phosphate deposits were exhausted before the end of the century, if they remained on Nauru. The Island was remote and small and would ultimately consist largely of worked out phosphate land: the population was expanding and was accustomed to high standards of living based on the phosphate industry. After inspection of a number of possible locations, proposals had been worked out in some detail for resettlement on Curtis Island. Under these proposals the Nauruans would be given the freehold of Curtis Island. Pastoral, agricultural, fishing and commercial activities would be established, and the entire costs of resettlement including housing and community services such as electricity, water and sewerage etc would be met out of funds provided by the Governments of Australia, New Zealand and the United Kingdom. It was estimated that the cost would be in the region of 10 million pounds.
>
> ...
>
> In the discussions the Nauruan representatives said that they held firmly to the view that the Australian Government's proposal would not secure the future of the Nauruans as a separate people but on the contrary would result in their absorption in the Australian community as Australian citizens.
>
> ...
>
> Moreover after further considering the difficulties of finding a place for resettlement that would meet enough of their requirements to be acceptable to the Nauruan people their Council had now formed the view that they should no longer expect the Australian Government to

> be responsible for Nauruan resettlement and that the Nauruan people should stay on Nauru and not resettle at all.
>
> The Australian representatives noted these views and said that the Commonwealth Government would consider them in the light of all the circumstances including the obligations placed on the Administering Authority by the United Nations Trusteeship Agreement and the recommendations made concerning resettlement and related matters by the United Nations Trusteeship Council. However, the Government would continue with its investigations and negotiations with a view to the successful achievement of the resettlement of the Nauruan people.
>
> ...
>
> Mr Barnes said that the Trusteeship Agreement for Nauru was administered jointly by the Governments of the United Kingdom, New Zealand, and Australia. The Australian Government would need to consult these Governments regarding the decision of the Nauruan people not to persevere with resettlement. The three Governments would consider the position in the light of their obligations under the Trusteeship Agreement... ."

141. In April 1965 Australia announced that, in view of the clear attitude of Nauru, the particular resettlement proposals involving Curtis Island should be dropped and resettlement as a serious option lapsed at this point. However, the Trusteeship Council in June 1965 nevertheless endorsed the view of the 1965 Visiting Mission that the idea of resettlement should not be abandoned, while reaffirming the right of the people of Nauru to self-government or independence (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 20th Session*, Suppl. No.4 (A/6004) para.324). Among the conclusions and recommendations of the Council were the following:

> "The Council notes that, as the Administering Authority was unable to satisfy fully the Nauruans' conditions that they be able to resettle as an independent people and that they should have territorial sovereignty in their new place of residence, and as the offer of Australian citizenship was unacceptable to the Nauruans, they decided not to proceed with the proposal for resettlement on Curtis Island and the Australian Government has discontinued action on this proposal.

> It further notes that at the 1965 Canberra Conference the representatives of the Nauruan people and the Australian Government agreed that the Administering Authority in cooperation with Nauruan representatives would actively pursue any proposals that might give promise of enabling the Nauruan people to resettle on a basis acceptable to them and one which would preserve their national identity.
>
> The Council endorses the view of the 1965 Visiting Mission to Nauru that the question of the future of the Nauruan people has been closely bound up with their search for an alternative homeland and that the idea of resettlement should not be abandoned, but that a further effort to find a basis of agreement would be desirable."

Hence, as late as 1965 resettlement was still a solution that had not been entirely abandoned by the United Nations.

Section II: Rehabilitation

A. THE REHABILITATION INVESTIGATIONS

1. The CSIRO inquiry

142. The possibility of regenerating the worked out phosphate lands was raised in the post war years by the United Nations, the Administering Authority and the Nauruans.

143. The Trusteeship Council, at its 8th session (1951), recommended that it considered it "advisable that studies of a technical nature should be carried out in order to determine the possibility of making use of worked-out phosphate land" (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 6th Session*, Suppl. No.4 (A/1856), p.229). Such an inquiry was subsequently initiated by the Australian Government in 1953 when it commissioned to that end the Commonwealth Scientific and Industrial Research Organisation (CSIRO) to report in particular on:

(a) the area and location of land suitable for agricultural purposes;

(b) the crop or animal production systems which might be followed to make the best use of the land, having regard to the environment and the settlement pattern of the island and with due regard to self-sufficiency and commercial farming;

(c) the physical and economic possibilities of regenerating worked-out phosphate land so as to make it useful for agricultural purposes in the future; and

(d) recommended research and experimental agricultural projects which might be undertaken.

144. The report (Annex 14 to Preliminary Objections) ran to 23 pages and encompassed the geography, population, food supplies (past and present), land use, climate, soils, problems of increasing the area of land suitable for agriculture and possible agricultural systems with special reference to self sufficiency. The last two sections contained estimates of human population that might be supported and made five recommendations concerning improvement of agriculture. The CSIRO report estimated that, even applying the most favourable assumptions concerning the contribution of the phosphate lands to agriculture, the island could support a population of no more than 3,000 at a somewhat primitive level. That is, even if the worked-out land could be put to some form of agricultural use, it was doubtful that the island would be able to support Nauru's growing population in any event.

145. With regard to rehabilitation of the worked-out phosphate lands, the report found as follows:

> "Phosphate has been extracted from about 25 per cent of the available area, and at the present rate of extraction, the whole area will have been worked-over within the next half century. The authors were specifically requested to investigate the possibility of regenerating these worked out areas so as to make them useful agricultural lands for the future but as a result of this examination have formed the opinion that the regeneration of this land is a practical impossibility.
>
> The old German workings (pre World War 1) were inspected most carefully. These have now been abandoned for about forty years. It is true that they have now a partial cover of vegetation but this vegetation appears to have rooted in small unextracted pockets of phosphate, and consist essentially of the same three or four species which at present dominate the phosphate lands. There is no sign of any

> appreciable weathering on the exposed coral pinnacles, as might well have been anticipated from the presence of protruding coral on the unworked phosphate lands.
>
> It would be possible to level this worked out land with the aid of explosives and heavy crushing equipment, and it would be possible to import soil, eg as backloading from the mainland, but there is no certainty that the soil would stay on the surface and not be washed down into the crushed coral. Even if the plateau were to be resurfaced and maintained in this manner, there would still be the question of an adequate water supply to supplement rainfall. It is believed that any such scheme would be fraught with so much uncertainty as to final success, and would be so expensive that it may be ruled out at once as a practical proposition for the widescale utilisation of these lands. (p.12)
>
> ...
>
> No practical possibility whatsoever is seen of widescale utilisation of worked out phosphate lands for agriculture. Although it is possible that some better use can be made of these lands than at present there will always be the limitation imposed by dependence upon an erratic rainfall." (p.13)

146. The report was brought to the attention of the Trusteeship Council and was referred to from time to time in its proceedings. In 1959/60, both orally and in writing, the CSIRO confirmed that in its view there had been no developments of any sort which would cause it to alter its 1954 conclusions (Annexes 15 and 16 to Preliminary Objections). Dr Phillis, one of the two authors of the CSIRO report, said on 1 November 1960 that "he sees no hope of regenerating the worked out phosphate land on the Island, and even if the phosphate was replaced with soil the fact that the Island was subject to very severe drought and that fresh water reserves were very limited (as ascertained since 1953) agriculture would not be possible" (Annex 16 to Preliminary Objections). This conclusion was transmitted to the Trusteeship Council.

2. BPC estimates

147. On 5 October 1964 the BPC, in response to a Department of Territories' request of 14 September 1964, sent a memorandum which covered an estimate

of the cost of restoring the worked-out areas after the pinnacles had been levelled by blasting, on the basis of shipping soil from the closest proximity to the ports where phosphate was presently discharged by ships employed in the trade (Annexes 17 and 18 to Preliminary Objections). The reason for approaching the BPC and thus reactivating the subject was that, in announcing their rejection of resettlement proposals, the NLGC had requested that their worked out phosphate lands should be restored by backfilling with soil from Australia. Head Chief Hammer DeRoburt was quoted in the BPC's memorandum as saying that it was intended to plant coconuts on the restored mined areas with a view to maintaining the growing population of Nauru after the phosphate deposits were worked-out.

148. This 1964 study by BPC looked separately at the cost of levelling the pinnacles and of unloading and transporting soil to the area to be reclaimed. It envisaged blasting pinnacles at a height one third above their base to rough fill the space between and crushing sufficient limestone to level and compact the area. It estimated this would cost 11,400 pounds per acre or a total of 40 million pounds for the total phosphate area, estimated at 3500 acres (1400 hectares). In relation to replacement with soil the conclusion was that it would be economically impossible to replace the whole of the phosphate mined with soil from an outside source. This would require 90 million tons, which would mean backloading 3.75 million tons of soil a year for 25 years. The conclusion was that "the cost of procuring, shipping and landing such a quantity of soil at an estimated 3 pounds 18 shillings and 2d per ton would be beyond consideration". Nevertheless, it estimated the total cost of procuring and shipping soil and discharging and spreading it over the whole phosphate area at 88 million pounds. Levelling the pinnacles would be 40 million pounds. In total, therefore, for levelling and resoiling the whole of the area able to be mined, a sum of 128 million pounds was estimated. BPC envisaged that this process would occur over 25 years. In today's values, this represents about $A1.8 billion in total. The Nauruans were given a copy of this letter.

149. On 14 December 1964 CSIRO advice was also sought on the Nauruan request (Annex 19 to Preliminary Objections). On 18 January 1965 it replied (Annex 20 to Preliminary Objections):

> "The proposal to level out limestone pinnacles and cover the worked-out areas with four feet of imported soil is of such high cost that it

could not possibly be justified on any grounds for the likely return that would accrue from such investment.

With the variable rainfall pattern at Nauru we are very doubtful if coconut palms could be grown on areas treated in that way at higher altitudes where the roots of the coconut palms could not tap the water table. Also, the population that could be supported by coconut planting would be very small in relation to the size of the investment. In addition there is obviously no point in reclaiming worked-out phosphate areas at very high expense until the narrow strip of coastal plains surrounding the island is intensively used for agriculture.

Because of the variability of the rainfall, the lack of suitable underground water for irrigation and the isolated location of Nauru Island, we are unable to foresee any type of agriculture at a reasonable cost that could possibly give the Nauruan population a standard of living appreciably above the subsistence level.

The phosphate areas apparently have never been productive lands and it appears that vegetation regeneration on worked-out areas is virtually nil. Fresh water supplies for domestic and garden use appear to be a major problem on the island. A thought that has occurred to us is that the mined areas consist of inert coral and phosphate which apparently behave in a similar manner to no-fines concrete. Would it be feasible and economic to seal some of these areas with bitumen or cement, firstly to give catchments for gathering rainfall and secondly to store water for domestic and garden use? If this is feasible the water could be initially used for domestic and garden use by the present relatively large population and when mining is completed, for small scale intensive irrigation for food crop production by Nauruans. Importation of soil of only one foot depth may be worth considering for these small, intensively gardened areas. You might consider that this suggestion belongs in the crazy field, but we consider it far less crazy than the proposal to resoil the major part of the island.

If the Nauruans wish to foresee a reasonable standard of living in the future, we do not consider there is any reasonable alternative to resettlement in another location."

150. The BPC later commented (letter of 10 February 1965, Annex 23 to Preliminary Objections) that the CSIRO suggestion to seal worked out phosphate land for water catchment purposes appeared impracticable.

151. On 20 January 1965 the BPC had, at the request of the Department of Territories, made an estimate of the cost of shipping soil from Fauro, an island in the Solomons (Annex 21 to Preliminary Objections). The exercise, which BPC stressed was hypothetical, concluded (p.2) that:

> "the governing factor in freight cost is the rate of discharge at Nauru which would have to be carried out with ships gear, that the use of medium sized bulk carriers might be most favourable and that the cost of procuring and shipping soil from an island such as Fauro would be much the same as from normal discharging ports in Australia and New Zealand."

152. A further BPC letter (Annex 25 to Preliminary Objections), dated 2 April 1965, to the Department of Territories on the cost of a pilot project in regenerating the worked out phosphate land was discouraging in that it concluded that a pilot operation would yield little information in the way of establishing cost. It read:

> "Our estimate of 36,570 pounds per acre (see our letter dated 5 October 1964) was based on a large scale operation fully equipped to obtain, receive, load, discharge, land and distribute the soil including the laying of a special set of moorings at Nauru. It assumed the availability of suitable soil and of course the necessary labour force was taken into account.
>
> In operating a Pilot scheme none of these factors would pertain. Assuming that suitable soil could be obtained close to, say, Melbourne or Geelong (130,000 tons would be required for 20 acres) it would need to be carted by road vehicle, dumped on wharf, loaded by grabs and discharged at Nauru with makeshift equipment into barges not suitable for carrying bulk material. Adequate shore discharge facilities do not exist at the Island to off load the soil from the barges and ships would need to moor at existing berths to the exclusion of ships discharging general cargo and/or loading phosphate. Turn around would thus be slowed down which would reduce the effective supply of phosphate and add to freight costs.

> Not in any respect could existing plant and labour handle such a project efficiently. To attempt it on these lines would amount to attacking a mammoth project on a knife and fork basis and the cost could be expected to be as much as two or three times more than the estimated cost of 36,570 pounds per acre which is based on a thoroughly planned and mechanised operation. In such circumstances it seems to us that a pilot operation would yield little in the way of establishing cost - indeed unless ways (unknown to us) can be found of greatly reducing our present estimates cost will in any case defeat the purpose of the exercise."

Today, this estimate of 36,570 pounds is the equivalent of $A512,000 per acre. (There are 2.47 acres to a hectare.)

3. The Davey Committee

153. By May 1965 the Department of Territories concluded that its own investigations had established that the cost of rehabilitation would be so high as to be uneconomic and that there were serious doubts about any worthwhile results for agriculture due chiefly to probable loss of soil through the porous coral base and the erratic rainfall. It also noted that the Monsanto Company in the United States had cooperated with the University of Tennessee in recent years in experiments on the use of mined phosphate land and that the Company had commented that:

> "where the phosphatic material is right at the surface of the ground and practically all the soil is removed leaving only exposed bare rock ... This type of mined over land has insufficient soil left to relevel and the only way of putting this land into its former condition would be to move soil in by trucks from some other location. This we consider as uneconomical and unrealistic as the cost would be more than the possible value of the land for agricultural purposes" (Annex G to the 1965 Record of Negotiations, reproduced in Annex 2, Vol.3, NM).

154. On 10 June 1965, Mr Warwick Smith and Head Chief DeRoburt, in discussions in Canberra on the future of Nauru, signed a summary of conclusions which included the following section on rehabilitation (Annex L to the 1965 Record of Discussions, Annex 2, Vol.3, NM):

> "The Nauruan delegation stated that it considered that there was a responsibility on the partner governments to restore at their cost the land that had been mined, since they had had the benefit of the phosphate. The Australian delegation was not able on behalf of the partner governments to take any commitment regarding responsibility for any rehabilitation proposals the objectives and costs of which were unknown and the effectiveness of which was uncertain.
>
> It was agreed to establish at the earliest practicable date an independent technical committee of experts to examine the question of rehabilitation, the cost to be met by the Administering Authority."

About the same time the 1965 United Nations Visiting Mission to Nauru published its report which, while it did not touch on rehabilitation in its conclusions, included (Annex II) a NLGC memorandum on the rehabilitation of worked-out phosphate lands (Annex 12, Vol.4, NM).

155. By the end of 1965 the members of the technical committee were appointed. The individual members were mutually acceptable to the NLGC and the Administering Authority. They comprised:

Mr G E Davey (Chairman)	Consulting Engineer Sydney, NSW
Prof J N Lewis	Prof of Agricultural Economics University of New England Armidale, NSW
Mr W F Van Beers	Soil and Land Classification Officer, FAO, ROME

156. The Committee's terms of reference, as set out in the report, were to examine:

> "(i) whether it would be technically feasible to refill the mined phosphate areas with suitable soil and/or other materials from external sources or to take other steps in order to render them usable for habitation purposes and/or cultivation of any kind;
>
> (ii) effective and reasonable ways of undertaking such restoration, including possible sources of material suitable for refilling;

> (iii) estimated costs of any practicable methods of achieving restoration in any effective degree.
>
> The terms of reference also instructed the Committee, assuming it appeared to be feasible to achieve restoration along the lines referred to in the paragraph above, to:
>
> (i) investigate the water resources of Nauru;
>
> (ii) examine fully the possibility of growing in the areas to be restored, trees, vegetables and other plants of a utilitarian kind, having regard both to what was done in this way in the past and what might be most useful to the Nauruan people in the future."

157. The Committee's 68 page report (reproduced as Annex 3, Vol.3, NM) was submitted in June 1966 to the Australian Government and the NLGC. It comprised 10 sections and 7 appendices and was the result of submissions and consultations with the NLGC, the Australian Government, BPC and others as well as a 10 day visit to Nauru. The first conclusion (Section 2) was as follows:

> "(i) that while it would be technically feasible (within the narrow definition of that expression) to refill the mined phosphate areas of Nauru with suitable soil and/or other materials from external sources, the very many practical considerations involved rule out such an undertaking as impracticable;"

158. The Davey report provided information on "technically feasible methods of treating worked areas, the costs and benefits of alternative treatments and the implications of such actions" (p.8). It sought to "outline a set of measures for the treatment of worked-out phosphate areas which would be reasonable in terms of the costs involved and the contributions which would be made towards a sound and flourishing economy". (p.8)

159. Section seven of the report contained an examination of the Nauruan economy after exhaustion of the phosphate. It pointed to the ability of Nauru to sustain a high per capita income based on income return from phosphate royalties.

160. Section eight examined possibilities for treatment of mined areas. It considered five alternative land treatments, recognising that the end use desired and costs would largely determine the choice of alternatives. It ruled out

complete refilling by imported soil as not a practicable alternative. It examined levelling of pinnacles and resoiling part or all of the worked-out areas using local and imported soil. Appendix III to the report gave detailed cost estimates. Depending on the soil depth, costs of from $94-240 million were estimated for levelling and resoiling (p.53 of report). This is equivalent to $A658 million to 1.68 billion today. The Committee pointed, however, to problems caused by the slope of the land which would require special anti-erosion measures.

161. The Committee examined two particular projects: construction of a new airstrip and construction of a water catchment and storage. If the two projects were carried out together their cost would be respectively $A8 million and $A18 million. This is equivalent to $A56 million and $A126 million today.

162. Finally, the Committee examined revegetation of exposed pinnacle areas. This would involve accelerating revegetation artificially such as by hand planting. However, an accurate assessment of benefits could only be obtained after experimental work.

163. Having examined possible options, the Committee considered likely benefits. It considered that "direct benefits (from resoiling) in the form of additional agricultural production would be relatively very small" (p.37). It concluded:

> "the direct agricultural and residential benefits from resoiling the worked out phosphate areas would be small in relation to the costs involved. No future land use would offset more than a fraction of the capital costs of resoiling land with imported soil. It would therefore be unreasonable to incur expenditures of the magnitude involved in resoiling the whole of the phosphate lands unless extremely high values were placed on the achievement of intangible objectives ... The Committee concludes, therefore, that even if resoiling of the whole of the worked-out areas with imported soil were technically feasible ... it would not make a contribution to economic and social life on Nauru commensurate with the costs involved" (p.39).

164. The Committee considered it would be possible to use the thin cover of soil on the remaining undeveloped phosphate lands as part of landscaping associated with levelling 600-700 acres for residential use (p.40). And levelling without any resoiling of the remaining area could be undertaken at a cost of $10.8 million (p.41). This is equivalent to $A70 million today.

165. Its conclusions were that a number of facilities could be constructed, at a total cost of $A31 million (today, $A217 million), which would provide a basis for the useful development of the island. These included a water supply, airport, treatment of some 500 acres so that the land would be available for public purposes and minor revegetation of the remaining area. It also recommended that steps be taken as soon as possible to plan the land use of the island completely.

4. Reception of the Davey report

166. On 20 June 1966, discussions were held between the Partner Governments and the Nauruans about the future of the phosphate industry. Whatever prospects existed for accepting and implementing the conclusions of the Davey Report were destroyed by the Nauruans themselves. Head Chief DeRoburt submitted a 20 page statement on the Davey Committee's report which commended certain parts, and condemned those parts which did not support the Nauruan case on rehabilitation (Annex 11 to the 1966 Record of Negotiations, reproduced in Annex 4, Vol.3, NM). The latter approach predominated, with such section headings as "Signs of undue bias in the Committee's report", "Assertions unsupported by the report" and "Factual inaccuracies in the Report". Among the 17 conclusions were that the Committee had:

- confirmed the judgment of the NLGC that it was "technically feasible to refill mined phosphate areas with suitable soil and/or other materials from external sources".
- confirmed that given a water supply and improved communications the Nauruans would enjoy a very satisfactory level of living on the island.
- gone beyond its terms of reference when it presumed to pronounce that complete re-soiling was technically feasible but "impracticable".
- commended the proposal to build an airstrip designed as a catchment area for water.
- made a serious error of judgment in considering only the facilities needed to support a population of 10,000 by the turn of the century.

167. On 28 June 1966 Mr Warwick Smith replied in a joint delegation statement (Annex 16 to the 1966 Record of Negotiations, reproduced in

Annex 4, Vol.3, NM). He stressed that the Partner Governments had not yet considered in detail either the Davey Committee's report or the Nauruan statement. The Committee's report, he said, followed two offers of resettlement, both declined by the NLGC. He then traversed parts of the Nauruan comments, deprecated attacks on the Committee's integrity and proposed a joint detailed examination.

168. On 1 July 1966 Head Chief DeRoburt and Mr Warwick Smith signed another agreed minute which contained a lengthy paragraph on the relationship of rehabilitation and resettlement costs to financial arrangements for the phosphate industry (Annex 19 to the 1966 Record of Negotiations, reproduced in Annex 4, Vol.3, NM). Nauru linked the issue of rehabilitation to future financial arrangements. The statement read:

> "The Nauruan view was that rehabilitation of Nauru was a matter of primary concern for the Nauruan people. They indicated that they were pursuing the rehabilitation proposals in the absence of any acceptable proposal for resettlement. They said that they should receive the full financial benefit from the phosphate industry so that there would be funds available to rehabilitate the whole of the Island. The Joint Delegation explained that the benefits to be received by the Nauruan community from the proposed phosphate arrangement would, it was envisaged, be adequate to provide for the present and long-term security of the Nauruan community including an adequate continuing income when the phosphate has been exhausted and when the costs of any resettlement or rehabilitation have been met. The Joint Delegation said they would be prepared to consider that, within the framework of a long-term agreement, arrangements be made for an agreed payment into the long-term investment fund, from which the costs or part of the costs of rehabilitation could be met. It was agreed that the report of the Committee on Rehabilitation should be examined by the Working Party" (emphasis added).

169. The Working Party was chaired by Mr C E Reseigh, a senior officer of the Australian Department of Territories, and included two Nauruans and their financial adviser. Its report (Annex 7 to Preliminary Objections) noted that agreement could not be reached regarding consideration of the Davey Committee findings. Head Chief DeRoburt criticised the failure of the Department of Territories to present a detailed critique of the Davey report

similar to the Nauruan critique, repeated the Nauruan view that rehabilitation was the responsibility of the Partner Governments and said how they financed that responsibility was up to them. Mr Reseigh emphasised (para.15) that the Australian Government was not saying that it did not take any responsibility for meeting the cost of rehabilitation, but that it would do this by ensuring that the payments to the Nauruans would be sufficiently generous to enable all expenditure necessary for the long term welfare of the Nauruans, including rehabilitation if they decide upon it, to be met. He suggested that it would be of use to look carefully at the Davey report to determine what rehabilitation, if any, seemed sensible and proper to undertake. It would also be useful to know what the order of magnitude of the cost of such a rehabilitation program would be. Head Chief DeRoburt replied (para.16) that, as there was no acknowledgment of the Partner Governments' responsibility, he could not see that any advantage would be served by the Working Party discussing the report. So, once again, the Nauruans eliminated any prospect of progress along the lines suggested by the Davey Committee.

170. On 18 April 1967 the report of the Working Party was discussed in formal negotiations between the Partner Governments and the Nauruans (SR5, pp.85-89, Record of the 1967 Negotiations, Annex 5, Vol.3, NM). It covered, *inter alia*, the preparation of a price indicator, profit sharing in mineral extracting, rehabilitation and the Long Term Investment Fund. On rehabilitation, Mr Warwick Smith repeated that the Partner Governments considered that decisions on what action should be taken on rehabilitation was wholly a matter for the Nauruans. Thereafter there is no mention in the formal negotiations with the Nauruans of the Davey report although exchanges on the principle of rehabilitation and responsibility continued for another month.

B. UNITED NATIONS ATTITUDE TO REHABILITATION

1. 1964

171. As resettlement receded as a possibility, attention turned within the United Nations to rehabilitation. But, as the various studies referred to in the previous section indicate, rehabilitation was not without problems. In 1964 the Special Representative explained, in answer to questions from Liberia, why it was not feasible:

> "it would be extremely difficult and expensive to reclaim the land from which the phosphate had been taken. The phosphate deposits

> occurred in plateaux around very hard limestone pinnacles and reached to a depth of twenty to thirty feet. The pinnacles occurred at intervals of about three or four yards, and their diameter at the base was ten or twelve feet. In order to recover the land, it would be necessary to blast down the pinnacles one by one, crush the rock and cover it with a sufficiently thick layer of fertile soil imported from Australia. But even if that were done two insuperable difficulties would remain. First, the ground on Nauru was very porous. When there was any rain, whatever the amount, the water passed quickly through the layers of earth and was held only by the pressure of the salt water, whose density was greater. The extreme porosity meant that the land would be arid. Even if certain crops could be grown, cash crops would be out of the question. Secondly, the island was remote from any possible market and could be worked only on a basis of subsistence agriculture. That was not what the Nauruans wanted. It was probably for that reason that the people of the island had stated that they would be compelled to find a new home in order to survive as a people" (United Nations, *Trusteeship Council Official Records, 31st Session*, Doc.T/SR.1236).

2. 1965

172. The 1965 Visiting Mission noted the views of the 1962 Mission on rehabilitation. That Mission had concluded that:

> "settlement ... in a new home is unavoidable ... [N]o one who has seen the wasteland of coral pinnacles can believe that cultivable land could be established over the top of it except at prohibitive expense. Even a layman can see that, and it is to be noted that the suggestion for rehabilitation of the land has never come from anyone who has visited the island" (United Nations, *Trusteeship Council Official Records, 29th Session*, Suppl. No.2, para 65; reproduced in Annex 11, Vol.4, NM).

173. The 1965 Mission noted the enormous expense and difficulties said to be involved but, not being experts, declined to make any recommendation. Appended to the report, however, were memoranda submitted by the NLGC. Also reproduced was a statement of the BPC with estimated cost of rehabilitation (United Nations, *Trusteeship Council Official Records, 32nd Session*, Suppl. No.2, reproduced in Annex 12, Vol.4, NM).

174. In discussion in the Trusteeship Council in June 1965, the Special Representative indicated that an expert committee would be established to make a full scale investigation. This proposal had arisen out of negotiations with Nauru the same month and resulted in appointment of the Davey Committee. A USSR draft resolution (T/L.1098) inviting the Administering Authority, *inter alia*, to restore the ground cover of the island was defeated in the Trusteeship Council (United Nations, *Trusteeship Council Official Records, 32nd Session*, Doc.T/SR 1269).

175. In the Fourth Committee in 1965, rehabilitation was again raised. The Liberian representative introduced a draft resolution on behalf of the Afro/Asian group, claiming that the Nauruans were already capable of full self-government and independence, which should be granted to them. Further, Australia should restore the island by returning soil in phosphate vessels which now arrived in Nauru empty and that the cost of so doing would be 12 million pounds (today, $A84 million) (United Nations, *General Assembly Official Records, 20th Session, Fourth Committee*, Doc.A/C.4/SR.1591). Mr McCarthy, the Australian representative, replied by saying that the draft resolution did not reflect the true circumstances, and that it was only by exploiting the phosphates that the Nauruans could live so well (United Nations, *General Assembly Official Records, 20th Session, Fourth Committee*, Doc.A/C.4/SR.1593).

176. Subject to some amendments, the Afro-Asian resolution was adopted in the Committee by 61-0-19. It requested that the Administering Authority fix the earliest possible date, but not later than 31 January 1968, for Nauruan independence and "that immediate steps be taken by the Administering Authority towards restoring the island of Nauru for habitation by the Nauruan people as a sovereign nation" (United Nations, *General Assembly official Records, 20th Session, Fourth Committee*, Doc.A/C.4/L.825). (The matter of the habitability of the island is discussed further in Part II, Chapter 3.) On 21 December 1965 resolution 2111(XX) was adopted in plenary by 84-0-25 (Australia, NZ, UK, US, other Western and Latin American States).

3. 1966

177. In July 1966 the Trusteeship Council was informed that the Davey report had been received by Australia the previous month and it was now being examined. It would be made available to the Council. Head Chief DeRoburt also addressed the meeting. The text of his statement is set out at paragraph 186 of

the Nauruan Memorial. It asserted that the Administering Authority should bear responsibility for rehabilitation of one third of the island.

178. In its report the Council made specific mention of rehabilitation. The conclusions on this point read as follows:

> "The Council recalls that the General Assembly, by its resolution 2111 (XX), requested that immediate steps be taken by the Administering Authority towards restoring the island of Nauru for habitation by the Nauruan people as a sovereign nation and notes that an investigation into the feasibility of restoring the worked out land has been carried out by a Committee of Experts, including a representative of FAO, appointed by the Administering Authority.
>
> The Council notes the statement of the representative of the people of Nauru that the responsibility for rehabilitating the island, in so far as it is the Administering Authority's, remains with the Administering Authority. If it should turn out that Nauru gets its own independence in January 1968, from then on the responsibility will be ours. A rough assessment of the portions of responsibility for this rehabilitation exercise then is this: one third is the responsibility of the Administering Authority and two thirds is the responsibility of the Nauruan people.
>
> The Council recalls that at its thirty second session the Special Representative gave the Council some details which outlined the magnitude and cost of replenishment of the worked out phosphate land. It is also noted that the 1962 Visiting Mission remarked that no one who had seen the wasteland pinnacles could believe that cultivable land could be established thereon except at prohibitive expense.
>
> The Council requests the Administering Authority to make the report of the Committee of Experts on the Rehabilitation of the worked out mining land available to its members as soon as possible and recommends that it be studied as soon as possible during the course of conversations between the Administering Authority and the delegates of the people of Nauru.

> The Council recalls resolution 1803(XVII) concerning permanent sovereignty over natural resources and invites the attention of the Administering Authority to its provisions.
>
> The Council notes the statement of the Administering Authority that the discussions between the joint delegation and the Nauruan delegation in Canberra will continue to be infused by what the Head Chief called 'a spirit of understanding' and a positive, most heartening and most encouraging 'response and attitude'." (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 21st Session*, Suppl. No.4 (A/6304) Part II, para.408.)

179. The Council in this recommendation also noted that further joint discussions were to be held to deal with the question of rehabilitation and the future operation of the phosphate industry. The Council hoped that these discussions would resolve both problems:

> "It believes that every effort will be made to adopt a solution in conformity with the rights and interests of the Nauruan people." (para.408)

180. Liberia had unsuccessfully sought to include in the report of the Trusteeship Council a statement to the effect that "if the Committee of Experts considers rehabilitation is feasible, Council recommends that the Administering Authority should take immediate steps towards restoring Nauru" (see United Nations, *Report of Trusteeship Council, General Assembly Official Records, 21st Session*, Suppl. No.4 (A/6304) para.426). A further Liberian attempt to get a similar resolution adopted by the Trusteeship Council in July 1966 also failed (United Nations, *Trusteeship Council Official Records, 33rd Session*, Doc.T/SR.1296).

181. It is clear that the Council was fully aware of the Nauruan claims during the negotiations on the future of the phosphate industry, including their claims as to responsibility for rehabilitation. These were set out in the preamble to the conclusions and recommendations of the Council. The question of rehabilitation was seen as part of the overall negotiations on the future of the phosphate industry. There is no suggestion that rehabilitation was a prerequisite to independence or that failure to rehabilitate would involve a breach of a trusteeship obligation. The sole concern was that the overall settlement secure Nauruan rights and benefits as a whole.

182. The Fourth Committee again considered Nauru in December 1966 at the 21st General Assembly. The Australian Representative referred (1663th meeting, 9 December 1966) to the various plans for the future of the Nauruan people including resettlement and the Davey report whilst the Liberian representative (Miss Brooks) took issue with several of the Trusteeship Council's conclusions. Miss Brooks raised again the question of ownership of the phosphate, independence by 31 January 1968 and her confidence that the Administering Authority would contribute to restoring the worked-out phosphate lands (United Nations, *General Assembly Official Records, 21st Session, Fourth Committee,* Doc.A/C.4/SR.1663.) A Liberian resolution (Doc.A/C.4/L.851) was introduced which had three main recommendations:

- that Australia fix the earliest possible date, not later than 31 January 1968, for Nauruan independence;
- that the Administering Authority transfer control over operation of the phosphate industry to the Nauruan people;
- that the Administering Authority take immediate steps, irrespective of the costs involved, towards restoring Nauru to habitation by the Nauruan people as a sovereign nation.

183. The original resolution (Doc.A/C.4/L.851) had confined its recommendation on rehabilitation to a situation "should the Committee of Experts consider that rehabilitation of the worked-out land is feasible". These words were however deleted in a Corrigendum - A/C.4/L.851/Corr 1. This resolution was adopted in Committee by a vote 58-3-13 and on 20 December 1966 in plenary by a vote 85-2 (Australia, UK) - 27 (NZ). For text of resolution 2226(XXI), see Annex 16, Volume 4, NM.

184. The Australian representative, speaking in explanation of his vote in the Fourth Committee said that it was "not correct to say that the phosphate operations had spoiled previously fertile land, for the land was rock and could not be used for agricultural purposes". Given that the negotiations were deferred until 1967 at the request of the Nauruan leaders, he regretted that the Committee had adopted such a resolution at that time.

185. The delegate of China also said that since Nauru had not responded to the Davey Committee:

> "he did not consider that any recommendation should have been made on the question of the rehabilitation of the worked-out land."

The amended resolution was adopted by the Fourth Committee on 15 December 1966 (United Nations, *General Assembly Official Records, 21st Session, Fourth Committee*, Doc.A/C.4/SR.1672.)

4. Trusteeship Council, 1967

186. The 34th session of the Trusteeship Council (29 May - 30 June 1967) again examined Nauru. It was attended by Mr Reseigh as Special Representative and Head Chief DeRoburt. The issue of the future of the island was considered at some length in the Trusteeship Council. Mr Reseigh mentioned, in the course of an account of conditions in the Territory, the 1966 Davey report on rehabilitation:

> "the Administering Authority considered that the Committee had made a painstaking review of the problem which made a valuable contribution to the solution of the problem, but the final decision rested with the Nauruan people. The new financial arrangements which had been made for the phosphate industry should enable the Nauruan people to take the necessary measures for their future" (United Nations, *Trusteeship Council Official Records, 34th Session*, Doc.T/SR.1313).

He also described the phosphate agreement reached on 15 June and the political discussions which had commenced in Australia following conclusion of the negotiations on phosphate. The latter would be continued after the Trusteeship Council session.

187. Head Chief DeRoburt felt the only important point on which there was real disagreement was the question of the rehabilitation of the worked-out mining lands. The Nauruans believed that the Partner Governments should accept responsibility for rehabilitating land worked before 1 July 1967, while the Nauruans would accept responsibility for land worked after that date, thus assuming two-thirds of the responsibility. (United Nations, *Trusteeship Council Official Records, 34th Session* Doc.T/SR.1313.)

188. In answer to questions and in the general debate Mr Reseigh repeated the Partner Governments' view on rehabilitation. The lengthy statement bears careful study. He said:

"The basic position of the Administering Authority regarding the restoration of worked-out land was, firstly, that there must be adequate resources to provide for the future of the Nauruan people, and, secondly, that the Nauruan people themselves should decide what was to be done. Taking up the second point, he recalled that various proposals had been made for the resettlement of the Nauruans, but that they had not been found acceptable by the Nauruan representatives. The Nauruans had decided that they wished to remain on the island. It was possible, however, that a future Nauruan Government or individual Nauruans would subsequently decide in favour of resettlement elsewhere. The choice must therefore be left open and the choice as to whether resources were to be utilized for rehabilitating worked-out areas or securing the future in other ways should also be left to the Nauruans.

With regard to measures to be taken for the treatment of worked-out areas, the matter had been considered by a Committee of Experts. The experts were people with high qualifications and the Nauruan representatives had approved their appointment. The Chairman had been one of the best qualified engineers in Australia, nominated by the appropriate professional body in Australia, and other members had been a professor of agricultural economics, and a soil expert of Belgian nationality nominated by the Food and Agriculture Organization. None of the members had been employees of or connected with the Australian government service. He was sorry that the Nauruan representatives had reflected on the objectivity of the experts. But in any case, it would not have been proper for the Administering Authority to act unilaterally on the basis of the report.

As to when the steps required should be taken, it would seem to him wise to leave open the maximum options regarding the use of available resources. If mined land was not needed and might not be needed for decades, it would seem better, rather than devoting resources to its rehabilitation immediately, to lay those resources aside at interest and undertake the treatment of the land as needs developed.

With regard to the use of resources, it seemed to him quite unrealistic to consider the question of treatment of worked-out land without considering the benefits of alternative uses of the resources, such as investment at

> interest or investment in Nauruan enterprises needing capital. The concern of the Administering Authority in the discussions which had just been completed had been that the resources available to the Nauruan community should be adequate. In considering that matter, there were many questions which had to be taken into account, including the continuing needs of the Nauruans when the phosphates were exhausted and income from their extraction ceased. All those aspects had been considered as carefully as possible by the Administering Authority in the settlement made. Under the agreement reached, payments to or for the Nauruans would amount to the equivalent of about $US21 million during the coming financial year. The Nauruans had a number of needs that they would wish to meet, including payments to the long-term investment fund which was designed to secure an income for the Nauruans after the phosphates were exhausted. Nevertheless, the sum represented about $US40,000 for each family over and above its earnings. The Administering Authority had placed before the Nauru Local Government Council a suggestion regarding the gradual levelling of the island and its covering with soil where necessary. It was estimated that the cost would be some $US2 million per annum. If the Nauruan community continued to contribute to the long-term fund at the present rate, and if the price-cost relationship remained as at present, the fund would total about $US400 million by the time the phosphates were exhausted. It would thus receive an annual income from investments of about $US24 million per annum. The Administering Authority believed that that settlement would give the Nauruan people a reasonable opportunity to safeguard their future, whether on Nauru or elsewhere." (United Nations, *Trusteeship Council Official Records, 34th Session*, Doc.T/SR.1314.)

189. Mr DeRoburt was questioned by the representative of the United States on a number of issues. The following records some of that exchange.

> "Mr McHenry (United States of America) asked whether Nauruans lived on the unworked phosphate lands or farmed them. Mr DeRoburt (Adviser to the Special Representative) replied that previously the Nauruan population had lived exclusively off what they could pick or fish and that the trees growing on the phosphate plateau had provided them with material to build their homes. However, since the deposits had begun to be worked and the population had derived benefits from

> them, the Nauruans no longer lived on the phosphate lands or farmed them...
>
> Mr McHenry (United States of America) said it was recognised that the Nauruans wanted to stay on their island, especially in view of the difficulties of settling elsewhere. However, the Nauruans might for some reason be obliged to change their minds one day. He asked whether, that being so, it was wise at the present time to embark on the rehabilitation of all the worked-out lands and whether it would not be preferable to do as other countries had done and follow a more conservative mining process.
>
> Mr DeRoburt (Adviser to the Special Representative) said that the question had been raised on several occasions by the representatives of the Partner Governments. The Nauru Local Government Council had considered the matter at length and its reply was to be found in the documents which had been circulated to the members of the Trusteeship Council. There were several ways of carrying out the rehabilitation program but the point was that whatever was done would be costly. The Nauru Local Government Council would have to take care not to squander the profits it would derive from the phosphate industry - its only source of income - if it was not to be in difficulty when the time came to rehabilitate the lands."

190. The delegate for France also said:

> "Sound management of the capital that would accumulate before the phosphate deposits were exhausted should enable the Nauruan community to live comfortably on Nauru or, if it so decided, elsewhere. His delegation welcomed Head Chief DeRoburt's statement that the Nauruan leaders were endeavouring to create work that could at least partially replace phosphate extraction. It regretted, however, that agreement had not yet been possible on the question of rehabilitating the worked-out land. Nevertheless, the situation was generally satisfactory, and his delegation was sure that the Territory would take its final decision on its future in total freedom and in complete conformity with its aspirations."

191. The United States said:

> "His delegation believed that the dominant influence of the phosphate industry on all aspects of Nauru's future should be the subject of careful and urgent consideration, and it had therefore been encouraged to learn from the Head Chief that attention was being given to the possibility of diversifying the Nauruan economy. However, consideration should also be given to certain variables in that economy; for scientific progress, which could help to solve the Nauruan water supply problem, could also reduce the need for phosphate. It was difficult, therefore, to predict with certainty whether future generations of Nauruans would wish to remain on the island, as the present generation did. That problem inevitably affected the question who should rehabilitate the worked-out land, and more particularly whether, when and at what rate rehabilitation should be carried out. His delegation therefore hoped that the representatives of the Nauruan people would consider those questions carefully, both before and after the expected political changes in the Territory." (United Nations, *Trusteeship Council Official Records*, 34th Session, Doc.T/SR.1316.)

192. Mr Reseigh, in his closing statement on 23 June 1967 regretted that agreement had not been arrived at on the treatment of the worked-out lands. He gave details of a plan under which $A12 million per annum (today, $A84 million) would be paid into a special fund to meet the costs of a new airport and living space until the whole of the mining area had been treated. He said that the responsibility of the Partner Governments was to see that the financial resources would be available so that the Nauruans could give effect to their decisions concerning their own future and affirmed that the Partner Governments could not have been more generous in their financial arrangements. For example, they were selling the assets of the BPC at historic rather than commercial cost and it had been decided to give the Nauruans 100% of the net proceeds of the phosphate at fair value, although the practice of sharing net profits in most other similar enterprises was 50/50. He added that the agreed arrangements had taken into account the extractive nature of the industry and the small size of the island. (United Nations, *Trusteeship Council Official Records, 34th Session*, Doc.T/SR.1317.)

193. At the 1320th meeting of the Trusteeship Council, a Liberian resolution (T/L.1132) that recommended that Nauru become an independent republic by 31 January 1968; that the conclusion of a treaty of friendship should not be a

precondition to independence; and that the Administering Authority should take immediate steps to restore the island for habitation, was defeated 2(Liberia, USSR)-5-1 (China) (United Nations, *Trusteeship Council Official Records, 34th Session*, Doc.T/SR.1320).

194. The Chapter of the 1967 report of the Trusteeship Council on Nauru is set out in Annex 28 to the Preliminary Objections. The Council in its report noted the proposals for the future of Nauru that had been put forward in discussions between the Partner Governments and Nauruan representatives. This led the Council to:

> "note(s) with satisfaction that the 1967 Canberra discussions were held in a favourable atmosphere. The Council, however, regrets that the parties were unable to complete their discussions due to lack of time but notes that they undertook to study the various proposals and to resume discussions at an early date. The Council is confident that these discussions will take place in the same spirit of cooperation and expresses earnest hope that agreement will be reached to the satisfaction of both parties. The Council is gratified to note that the Administering Authority has expressed its sympathetic attitude in connexion with the Nauruans wish to realise their political ambitions by 31 January 1968." (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 22nd Session*, Suppl. 4 (A/6704), Part II, para.322.)

195. In relation to rehabilitation, this was considered under the general heading of economic advancement. The Council rehearsed at length the previous consideration of this matter by the Council and the views of the relevant Parties. The views of the Partner Governments and of Nauru were set out at length. (See United Nations, *Report of Trusteeship Council, General Assembly Official Records, 22nd Session*, Suppl. No.4 (A/6704) Part II, paras.378-390). It is useful to set out the full text of the conclusion reached by the Council in relation to the phosphate settlement:

> "The Council, recalling its belief that every effort will be made to adopt a solution to the phosphate question in conformity with the rights and interests of the Nauruan people, notes with satisfaction that an agreement was reached in Canberra in 1967 between the Nauruans and the Administering Authority, whereby the ownership, control and management of the phosphate industry will be transferred to the

Nauruans by 1 July 1970. The Council further notes with satisfaction that transitional arrangements provide for a substantial increase in phosphate royalties and for the increased participation of the Nauruans in the operation of the industry.

The Council notes that the Administering Authority has distributed the report of the Committee of Experts on the rehabilitation of the worked-out land in accordance with the Council's recommendation at the thirty-third session.

The Council also notes that the report of the Committee of Experts concluded, inter alia, that 'while it would be technically feasible (within the narrow definition of that expression) to refill the mined phosphate areas of Nauru with suitable soil and/or other materials from external sources, the very many practical considerations involved rule out such an undertaking as impracticable'. At the same time the report provides alternative means of treating the mined land. The Council further notes that the Nauruans have voiced strong reservations to this report and, inter alia, stated that the Nauru Local Government Council believes that the land already worked should be restored by the Administering Authority to its original condition. The Council notes further the statement of the Administering Authority that the financial arrangements agreed upon with respect to phosphate took into consideration all future needs of the Nauruan people, including possible rehabilitation of land already worked.

The Council, regretting that differences continue to exist on the question of rehabilitation, expresses earnest hope that it will be possible to find a solution to the satisfaction of both parties." (para.403)

5. Special Session, Trusteeship Council, November 1967

196. A special session of the Trusteeship Council, to terminate the 1947 Agreement for Nauru, was held on 22 November 1967. Head Chief DeRoburt, assisted by Professor Davidson, represented Nauru. The records of the meeting of the Trusteeship Council meeting are reproduced in Annex 29 to Preliminary Objections.

197. Head Chief DeRoburt's speech on 22 November 1967 was generous in its praise of Australia and the other Partner Governments.

> "Australia had administered the island of Nauru for almost half a century. About two generations of Nauruans had taken five decades to arrive at their present situation. Fifty years was not an unduly short period for a homogeneous group of a few thousand people with a single culture and heritage, one language and one religion, to learn to manage their own affairs. Australian tutelage of those people, which it also exercised also on behalf of the other two partner Governments of New Zealand and the United Kingdom, had been effective. Those governmemts could be proud of their achievements on Nauru and he wished to thank them, on behalf of the people of Nauru, for the many benefits received."

198. Towards the end of the speech, Head Chief DeRoburt raised rehabilitation:

> "There was one subject, however, on which there was still a difference of opinion - responsibility for the rehabilitation of phosphate lands. The Nauruan people fully accepted responsibility in respect of land mined subsequently to 1 July 1967, since under the new agreement they were receiving the net proceeds of the sale of phosphate. Prior to that date, however, they had not received the net proceeds and it was therefore their contention that the three Governments should bear responsibility for the rehabilitation of land mined prior to 1 July 1967. That was not an issue relevant to the termination of the Trusteeship Agreement, nor did the Nauruans wish to make it a matter for United Nations discussion. He merely wished to place on record that the Nauruan Government would continue to seek what was, in the opinion of the Nauruan people, a just settlement of their claims." (United Nations, *Trusteeship Council Official Records, 13th Special Session*, Doc.T/SR.1323; reproduced in Annex 29 to Preliminary Objections.)

199. At the conclusion of the session the Council unanimously adopted resolution 2149 (S-XIII) on 22 November 1967 which recommended "that the General Assembly at its twenty-second session resolve, in agreement with the Administering Authority, that the Trusteeship Agreement for the Territory of Nauru approved by the General Assembly on 1 November 1947 shall cease to be

in force upon the accession of Nauru to independence on 31 January 1968" (text in Annex 19, Vol.4, NM).

6. *United Nations General Assembly, December 1967*

200. In 1967 the Fourth Committee had to consider not just the normal annual report of the Trusteeship Council on Nauru but also the outcome of the Special Session of the Council in November 1967, recommending independence for Nauru. The Summary Records are reproduced in Annex 30 to the Preliminary Objections. Mr K H Rogers of the Australian delegation made a comprehensive statement on 6 December 1967 on the history of Nauru and its administration under the Mandate and Trusteeship, its economy, social conditions and the recently concluded phosphate and political settlements (United Nations, *General Assembly, Official Records, 22nd Session, Fourth Committee*, Doc.A/C.4/SR.1739; Annex 30 to Preliminary Objections; full text reproduced in Annex 31 to the Preliminary Objections). He also observed in passing that "the Nauruans had enjoyed an enviable prosperity. The per capita income at 30 June 1966 had been over $US1,800, higher than the per capita income of Australia and one of the highest in the world". On the phosphate industry he said, as reproduced in the summary records:

> "For most of 1967 the representatives of Nauru and Australia had been discussing the future of Nauru and the phosphate industry and had reached happy agreements on both questions. Nauru would attain full and unqualified independence, without limitations of any kind, on 31 January 1968. The phosphate enterprise would be purchased by the Nauru Local Government Council and would come completely under its control and management in three years' time. The agreement provided for the supply of 2 million tons of phosphate per year at a price of $US12.10 per ton fob which would mean an annual return to the Nauruans of $15 million. The Nauruan authorities would set up the Nauru Phosphate Corporation, which would take charge of the phosphate industry in 1970, provided that the agreed payments had been completed by then. If the price of phosphate and the cost of production remained in the same relationship as at present and the Nauruans continued to put aside the same proportion of their funds as in the previous year, they would build up a fund which, in twenty-five

> years, would stand at approximately $400 million.[4] In that way the economic well-being of the population would be ensured once the phosphate deposits were exhausted." (Annex 30 to Preliminary Objections.)

201. Head Chief DeRoburt spoke at the same meeting and after describing the situation and the history of Nauru, he commented on the events of recent years and the future in these terms:

> "Those [historical] experiences had intensified the Nauruans' consciousness of their identity as a separate people and had increased their determination to be free and independent. Those were the social or cultural reasons why the decisions taken by the Nauruans and the Administering Authority were the only ones which could rightly have been taken. They were the reasons for the decision that he was sure the Committee would shortly be taking in regard to the Trusteeship Agreement.
>
> In other respects, the case was no less strong. During most of 1967, as had been mentioned, work had been under way to prepare the necessary political and administrative structure. Economically, Nauru's position was strong because of its good fortune in possessing large deposits of high-grade phosphate. That economic base, of course, presented its own problems. One which worried the Nauruans derived from the fact that land from which phosphate had been mined would be totally unusable. Consequently, although it would be an expensive operation, that land would have to be rehabilitated and steps were already being taken to build up funds to be used for that purpose. That phosphate was a wasting asset was, in itself, a problem; in about twenty-five years' time the supply would be exhausted. The revenue which Nauru had received in the past and would receive during the next twenty-five years would, however, make it possible to solve the problem. Already some of the revenue was being allocated to development projects, so that Nauru would have substantial alternative sources of work and of income long before the phosphate had been used up. In addition, a much larger proportion of its income was being placed in a long-term investment fund, so that, whatever happened,

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[4] See the CIE Study, Annex 26 to Preliminary Objections, which examines the income from phosphate mining generated since independence.

> future generations would be provided for. In short, the Nauruans wanted independence and were confident that they had the resources with which to sustain it." (paras.19 and 20)

202. On 7 December 1967 the draft resolution, as amended and further orally revised, was adopted unanimously by the Committee. It contained no reference to rehabilitation. On 19 December 1967, at its 1641st plenary session, the General Assembly formally adopted resolution 2347(XXII) (text in Annex 17, Vol.4, NM). Its principal operative paragraph read:

> "Resolves accordingly, in agreement with the Administering Authority, that the Trusteeship Agreement for the Territory of Nauru approved by the General Assembly on 1 November 1947 shall cease to be in force upon the accession of Nauru to independence on 31 January 1968."

CHAPTER 5

THE NEGOTIATION AND OUTCOME OF THE 1967 PHOSPHATE SETTLEMENT

Section I: 1965

203. One of the central issues in this case is the nature of the provision made by the Administering Authority for the future of the Nauruan people. Central to this is the 1967 settlement reached on the phosphate industry. This Chapter examines the negotiation of that agreement and the agreement itself.

204. Negotiations on the phosphate issue commenced in earnest in 1965. They were held in Canberra from 31 May to 10 June 1965 (Annex 2, Vol.3, NM). The negotiations took place between the Partner Governments and the Nauruan representatives led by Head Chief DeRoburt.

205. DeRoburt was assisted by two other Councillors and three expatriate advisers (2 economic, 1 legal). (One of the economic advisers was Mr K E Walker who in Appendix 2, Volume 1, Nauruan Memorial mentions that from 1965 to 1971 he was involved in all of the negotiations between Nauru and the partner Governments that dealt with phosphate, financial and political matters. Since November 1983 he has been the Honorary Nauruan Consul, Sydney.)

206. The discussions covered both political arrangements and the phosphate industry. Among the documents tabled were papers by Nauru and the Partner Governments setting out their position on the ownership of the phosphate (see Annexes A and J respectively of the Record of Discussions, Annex 2, Vol.3, NM 122 and p.177).

207. On 10 June 1965 a Summary of Conclusions was signed by both parties. In summary it:

- provided that as a step towards self determination a Legislative Council and an Executive Council were to be established. The former was to have an elected Nauruan majority and wide powers excluding only defence, external affairs and the phosphate industry.
- contained a statement by the Nauruans that they wanted 31 January 1968 as the target date for independence and a statement by the Administering

Authority that it considered that further discussions should take place in 1968 after two or three years' experience regarding the possibility of further movement towards greater Nauruan executive responsibility.

- provided that future arrangements for the phosphate industry including some form of partnership or joint enterprise were to be discussed in 1966 after the Legislative Council had been established and was operating effectively.

- provided that royalties for 1965/66 were to be 17/6 per ton and for 1964/65 13/6 ton, ad referendum, with the former being based on an extraction rates of 2m tons per annum "subject to the assurance of the Australian delegation that this acceptance was without prejudice to any Nauruan requests for a reduction in the rates of extraction after 1967/68." (These proposed royalty rates were put to the United Kingdom and New Zealand Governments for their agreement, which was given.)

- set out the views of the Nauruan delegation that it considered that "there was a responsibility on the partner Governments to restore at their cost the land that had been mined, since they had had the benefit of the phosphate. And also contained a statement by the Australian delegation that it was not able on behalf of the partner Governments to take any commitment regarding responsibility for any rehabilitation proposals the objectives and costs of which were unknown and the effectiveness of which was uncertain."

- contained an agreement to establish an independent technical committee of experts to examine rehabilitation.

- recorded the differing views of the Nauruans and the Administering Authority on the ownership of phosphate mining rights. The Nauruans argued that the BPC could not validly work the phosphate without the agreement of the Nauruan people, whereas the Australian delegation held that the rights were legally vested in the British Phosphate Commissioners.

208. The summary of conclusions is set out as Annex L to the 1965 Record of Negotiations reproduced in Annex 2, Volume 3, NM p.194.

209. Following the 1965 talks, the Australian Department of Territories prepared, with advice from the BPC, a package of proposals to put to the Nauruans on long term arrangements for the future conduct of the phosphate

industry on Nauru and the level of royalties to be paid pending such arrangements being accepted and put in place. These proposals were considered by the Australian Government which decided, subject to the agreement of the United Kingdom and New Zealand Governments, that a set of proposals be put to the Nauruans under which the phosphate industry would be operated by the Partner Governments and the Nauruans; the arrangements should ensure the continued supply of Nauruan phosphate to the Partner Governments; the Nauruans were to have full participation in the conduct of operations; and the Nauruans were to receive not less than 50% of the financial benefit. From 27 to 30 April 1966 discussions took place between officials of the three governments in preparation for the talks with the Nauruans. The meeting endorsed the proposed approach on the phosphate industry, which was then presented to the Nauruans in negotiations commencing in June 1966.

Section II: Nauruan/Partner Governments' Discussions, June/July 1966

210. Nauruan/Partner Governments' discussions were held over 12 sessions from 14 June to 1 July 1966. Mr Warwick Smith led for the Partner Governments and Head Chief DeRoburt for the Nauruans. (The Record of Negotiations is contained in Annex 4, Vol.3, NM.)

211. The Partner Governments' opening statement on 14 June 1966 put forward general principles which might serve as the basis of a long term agreement. It proposed the establishment of a Nauru Phosphate Commission, the fixing of the level of exports, financial arrangements providing Nauru with not less than 50% of the benefits with a substantial amount to be paid into a long-term fund and an assurance that the whole of the Nauru output would be available to the Partner Governments. The opening Nauruan statement rejected partnership with the BPC, said that the beneficial interest in phosphate should accrue to the Nauruans, but that the BPC could operate the phosphate industry as managing agents with both parties agreeing on a long term contract on price, full payment of profits with BPC receiving only a management fee and purchase by Nauru of the BPC owned assets on the islands. In the following discussions most exchanges centred on pricing policy. The Davey Committee's report on rehabilitation was also examined (paras.166 to 167 above).

212. On 1 July 1966 the two delegation leaders signed an agreed minute representing the outcome of the negotiations (NM, Vol.3, p.405). It provided that Nauruan phosphate should be valued at $A12.00 per ton for the purposes of any financial arrangements, the differing positions on which it was noted had

been set out in the opening statements of the two delegations. The issue was to be examined further in a Working Group, which would also examine the types of arrangements in force in various parts of the world for sharing the financial benefit of phosphate mining operations. It was envisaged that the BPC would serve as agents for the operation of the industry at Nauru. The Minute recorded the differing positions of the two delegations on rehabilitation. *Nauru said that they should receive the full financial benefit of the phosphate so that there would be funds available to rehabilitate the whole island.* The Joint Delegation, the Minute noted, explained that the benefits from the proposed phosphate arrangements would be adequate to provide for the long-term security of the Nauruan people, including a continuing income after the costs of any resettlement or rehabilitation. Each delegation maintained their respective positions on phosphate rights as stated in the 1965 discussions. Nauru proposed the purchase of the capital assets of BPC, but the Partner Governments proposed that the assets should continue to be vested in BPC. It was also agreed that talks should resume in October or November 1966 after the Working Party had met. In the event, these talks did not resume until after the consultations in 1967 between the Partner Governments.

Section III. The phosphate settlement 1967

A. POLICY RE-CONSIDERATION BY THE PARTNER GOVERNMENTS

213. In the last quarter of 1966 and the first quarter of 1967 the Partner Governments reconsidered their proposals in respect of the future of Nauru before resuming the suspended discussions with the Nauruans. Broadly, the view of the three Governments was that they should aim to reconcile the political advancement of the Nauruans with reasonable security of supplies of Nauruan phosphate. They agreed that the phosphate rights exercised by the Partner Governments might be extinguished and BPC assets on Nauru transferred to the Nauruans at an agreed price, as the Nauruans themselves had requested on 14 June 1966 (see para.211). Any phosphate settlement would also have to cover all outstanding questions, leaving the Partner Governments with no responsibility for such matters as resettlement or re-filling of mined areas. The Nauruans could determine their own future and become independent in 1968 if that was their wish. The transfer of all the rights in the phosphate was viewed as a *quid pro quo* for the assumption by Nauru of responsibility for rehabilitation. This is confirmed by the real value of the 1967 settlement in Nauruan Lands. See Part II, Chapter 2, Section VII of this Counter-Memorial.

B. RESUMED NEGOTIATIONS WITH THE NAURUANS

214. From 12 April to 15 June discussions resumed with the Nauruans in Canberra. The record of the 1967 negotiations (hereinafter "1967 Negotiations") is reproduced in Annex 5, Volume 3, NM. (Page numbers refer to the numbers used in the negotiation record appearing at the top of the page.) There were two breaks from 22 April to 9 May and from 20 May to 13 June to enable the Partner Governments to reconsider their negotiating stance on the future of the phosphate industry. Most inter-delegation discussions in these two months centred on the industry. Only three sessions were devoted to political matters. The phosphate negotiations culminated in a Heads of Agreement on 15 June 1967, which is not in dispute. The following account therefore emphasises the outcome of the negotiations, particularly on the issues of rehabilitation and transfer of the phosphate industry.

1. Phase 1: 12-20 April 1967

215. The Partner Governments opened negotiations on 12 April with a statement that outlined the stage reached when the talks were adjourned in July 1966 (SR1, pp.99-101, 1967 Negotiations) (see para.212 above).

216. Nauru submitted a statement (Nauruan Document 67/1, pp.144-153, 1967 Negotiations) prepared by their economic advisers, Philip Shrapnel and Co Pty Ltd of Sydney. It had two key elements: First, the Partner Governments' interests in the phosphate should be confined to supply and price, and secondly all other matters affecting the industry should be the exclusive concern of the Nauruan people. Further, the primary criterion for appraising various proposals was to be the welfare of the Nauruan people. It was said that "The needs of the Nauruan people centre around their long term future on Nauru. In order to remain on Nauru the island must be rehabilitated in a manner satisfactory to the Nauruan people".

217. Mr Warwick Smith stated that the Partner Governments had reconsidered their position and developed a fresh approach, especially on phosphate rights and the sale of capital assets. This was subject, as part of an overall settlement, to acceptance by the Nauruans of the principle that their future benefits from the phosphate would be adequate to provide for their needs including rehabilitation (or resettlement).

218. On 18 April the report of the Rehabilitation (Davey) Committee set up in 1966 was discussed (SR5, pp.87-89, 1967 Negotiations), with Mr Reseigh noting that agreement could not be reached in the Working Party regarding its consideration. Mr Warwick Smith said that he had gathered that the Nauruans thought that it could be useful for the joint delegation to indicate its views on the Report in an informal way. This he then did. He said:

> "The Partner Governments considered that decisions on what action should be taken regarding rehabilitation was wholly a matter for the Nauruans. The Partner Governments had said they would expect that the amount accruing to the Nauruan people from phosphate income would be adequate for the future needs of the Nauruan community including rehabilitation."

219. On 19 April Head Chief DeRoburt made and submitted three lengthy statements on rehabilitation, financial considerations and management of the industry (Nauruan Documents 67/2 - 67/4, pp.136-143, 1967 Negotiations). On the first issue, the Nauruan delegation, he said, had argued from the beginning that the responsibility for restoring the land already mined rested with the Partner Governments. The Nauruan need for proper rehabilitation of Nauru was, he said, a direct result of the breakdown of negotiations for resettlement. He said:

> "The Nauruans themselves proposed resettlement as being a solution that would be better for all parties concerned, and had such a solution been achieved there would by now have been a partnership arrangement yielding considerable benefits to both sides. However, the failure of the resettlement proposals to provide a secure future and preserve the national identity of the Nauruan people has left us no alternative except an expensive rehabilitation project for which we need every penny we can get." (p.141)

220. The following day (20 April) Mr Warwick Smith replied (SR7, pp.80-82, 1967 Negotiations). The decision to abandon the resettlement proposals, he said, was a decision by the Nauruans, not one that was forced upon them and, in so deciding, they had rejected proposals which were sound and practicable. It was the view of the Partner Governments that decisions regarding rehabilitation were matters for the Nauruans and that the Partner Governments' proposals in respect of the financial arrangements provided adequate means to carry out whatever redevelopment of the mined areas might prove to be necessary. Mr Warwick

Smith also denied that there was any widely accepted obligation to restore mined lands to their original condition and then tried unsuccessfully to get the Nauruans to discuss specific re-development projects which the Nauruans claimed would cost $240 million. This was rejected and the following day the negotiations were adjourned until 9 May to enable the Partner Governments to reconsider their position.

2. *Phase 2: 9-20 May 1967*

221. Following reconsideration by the Partner Governments of their negotiating stance, the next phase was almost totally devoted to the future of the industry on Nauru. On 10 May a Joint Delegation proposal (Joint Delegation Document 67/2, pp.158-161, 1967 Negotiations) was put to the Nauruans which substantially met their position on control of the industry. The paper, however, contained one paragraph (9) on rehabilitation, namely that "the partner governments consider that the proposed financial arrangements on phosphate cover the future needs of the Nauruan community including rehabilitation or resettlement".

222. On 12 May Head Chief DeRoburt asked (SR12, pp.62-5, 1967 Negotiations) whether he was right to assume that on the question of independence there were no differences between the Partner Governments and the Nauruans except on the timing of independence. Mr Warwick Smith, in reply, said that the Joint Delegation was able to talk about political advance in only a preliminary way. It was simply not ready to talk in depth about political advance because its attention had been concentrated on the not unrelated question of phosphate which had yet to be settled in a number of respects. The Partner Governments had agreed to discuss political issues during the current series of talks, but before he could reply to the Head Chief, he wanted to know what he meant by independence.

223. Chief DeRoburt responded by reading a 15 page statement (Nauruan Document 67/7, pp.119-133, 1967 Negotiations) on political and constitutional changes which had been prepared by his newly appointed constitutional adviser, Professor J W Davidson. Mr Warwick Smith said the Nauruan statement would be studied and then asked if the Nauruans had considered the various possible outcomes of self-determination and whether it could offer any comments on its reasons for choosing the particular proposal (sovereign independence) then put forward. He also asked how the process of self-determination was to be ascertained, to which Head Chief DeRoburt replied that it would be done

through the elected members of the NLGC (SR12, pp.63-64, 1967 Negotiations).

224. From 16 May to 14 June negotiations again returned to the phosphate industry. Mr Warwick Smith, in a long statement on the industry on 16 May, said that on the question of rehabilitation the Partner Governments maintained that it was not for them to decide what should be done; this was a decision for the Nauruans. Financial arrangements could be such as to permit the Nauruans to do what they wished, within reasonable limits, in the way of rehabilitation. As part of the total arrangement the Joint Delegation would like to see the Nauruans withdraw their claims in respect of rehabilitation (SR13, p.56, 1967 Negotiations). The following session (SR14, pp.46-52, 1967 Negotiations) he asked whether the Nauruans would press their view that the Partner Governments had responsibility for rehabilitation despite the financial arrangements made. The summary record (para.27) notes that "during the following discussion it emerged that the Nauruans would still maintain their claim on the Partner Governments in respect of rehabilitation of areas mined in the past, even if the Partner Governments did not press for the withdrawal of the claim in a formal manner such as in an agreement". Mr Warwick Smith also offered immigration rights to Australia and New Zealand, to which the Head Chief replied that the Nauruans had given up the notion of resettlement.

225. On 18 May Head Chief DeRoburt raised again his concern that the political questions were not being discussed and was told that the Joint Delegation was not in a position to talk substantially at that stage (SR16, pp.38-40, 1967 Negotiations). At the same meeting Mr Shrapnel read an 11 page statement (Nauruan Document 67/8, pp.108-118, 1967 Negotiations), in response to that of the Joint Delegation of 10 May. This covered guaranteed supply, agreed price, capital assets, phosphate rights, rehabilitation, the management of the industry and financial arrangements. It was suggested that the Partner Governments should sell the capital assets on Nauru to the NLGC.

226. On 19 May Head Chief DeRoburt requested the Partner Governments to consider another document (Nauruan Document 67/9, pp.106-7, 1967 Negotiations) on the phosphate industry and, in response to a suggestion from the Partner Governments, said that the Nauruans would not relate immigration to rehabilitation. The relations with the Partner Governments on immigration would have to be just like those the Partner Governments had with other governments (SR18, pp.32-33, 1967 Negotiations).

227. On 20 May the negotiations were adjourned until June as no agreement could be reached on matters relating to the phosphate industry, with the Nauruans insisting, *inter alia*, on being given complete control of management and operation of the industry on the island no later than three years after the signing of an agreement.

3. Phase 3: 13-14 June 1967

228. On 13 and 14 June, following the agreement of the United Kingdom and New Zealand Governments, the negotiations with the Nauruans on the future of the phosphate industry were concluded. There was again no mention of rehabilitation either in the four summary records or in the Heads of Agreement. On 15-June the Heads of Agreement was initialled by both parties. Its scope was set out in a press statement issued that day by the Minister for Territories (reproduced at p.1, 1967 Negotiations, Annex 5, Vol.3, NM) which read:

> "Representatives of the Nauru Local Government Council and the Governments of Australia, New Zealand and Britain have agreed to arrangements for the future operation of the phosphate industry on Nauru and on the terms under which phosphate on Nauru will be supplied to the three countries for the next three years.
>
> Announcing this today the Minister for Territories, Mr Barnes, said that the Nauru Local Government Council will buy the assets of the British Phosphate Commissioners at Nauru within the next three years on an agreed basis of valuation and terms of payment. Preliminary estimates put a value on the assets of the order of $20 million. During the three years the British Phosphate Commissioners will be responsible for day to day management of the industry at Nauru. If payment for the assets has been completed by the end of the third year the complete ownership and operation of the phosphate industry at Nauru will become the responsibility of the Nauru Phosphate Corporation which the Nauruans propose to establish.
>
> Phosphate will be supplied to the British Phosphate Commissioners at the rate of two million tons per year. The basic price will be $11 per ton in each of the three years provided that if the assets have been paid for in full by 30th June 1969 the basic price in the third year will be $12 per ton. The basic price will be varied so as to reflect market conditions according to an agreed formula. After all costs of

> production and of administration of Nauru have been met the figure of $11 would represent a return to the Nauruans of about $6 per ton.
>
> Mr Barnes said that it is open to either of the parties in the second year of the agreement to review the arrangements for the supply of phosphate but if these are not altered they will continue to operate after 30th June, 1970, unless they are subsequently altered at twelve months' notice.
>
> The royalty payments which have hitherto been made for phosphate from Nauru have been fixed at $4.50 per ton for 1966/67. Royalty payments in future years will be superseded by the arrangements set out above."

4. The purchase of BPC assets on Nauru

229. Paragraphs 496 to 500 of Volume 1 of the Nauruan Memorial deal with "reparation in respect of the payment for BPC assets purchased with Nauruan funds". The substance of the claim is that the $A21m paid by Nauru for the BPC assets on Nauru "were made on sufferance" (para.497) and that:

> "498. In the view of the Government of Nauru, the forced purchase of access to its own natural resources was a further segment in the long line of inequitable treatment at the hands of the Australian Government and its collaborators. The payment compounded the unjust enrichment resulting from the economic management of phosphate affairs in the trusteeship period and before. It was extracted during the very sensitive period prior to independence in January 1968, and one of several unusual features was the payment required by the outgoing authority for the capital assets of the British Phosphate Commissioners on the island: see the provisions on capital assets in Arts.7 to 11 of the Agreement of 1967."

Given the prominence given to this issue by Nauru, Australia considers it necessary at this stage to set out the actual historical record.

230. The question was first raised in 1966, not 1967, in the context of discussions on the future arrangements for the phosphate industry. On 14 June 1966 the Partner Governments, in an opening statement (Annex 3 to the 1966 Record of Negotiations, reproduced in Annex 4, Vol.3, NM), proposed an association agreement, with the Nauruans receiving 50% of the benefits. At no

point in the 5 page statement was there any mention made about Nauru purchasing the assets. At the same meeting the Nauruan delegation presented and circulated a 6 page opening statement (Annex 4 to the 1966 Record of Negotiations). Its substance was rejection of partnership. The BPC should instead operate the phosphate industry in the capacity of managing agents "under contract with the Nauruan people with present matters of contention (extraction rate, calculation of selling price etc) being defined by the contract". The statement then set out six basic principles which should underlie the agreement on the managing agent relationship. Principle (d) of the Nauruan statement read:

> "(d) Purchase of BPC - owned Capital Equipment
>
> The Nauruan people consider that it is consistent with their moral and legal rights as owners of the phosphate deposits that they should also own the capital equipment used by the BPC in mining phosphate on Nauru. It is therefore proposed that the Nauruan people should purchase this equipment from the BPC at a mutually agreed price. Since the Nauruan people do not have the financial resources to undertake the payment immediately it is further proposed that payment be made over a period of ten years with the annual amount being viewed as a charge on profits. Once the initial purchase has been completed it is expected that the BPC will look to the Nauruan people for such replacement of the capital equipment as may be required."

Thus, the proposal to purchase the assets came from the Nauruans themselves.

231. On 1 July 1966 an agreed minute was signed by Mr Warwick Smith and Head Chief DeRoburt (Annex 19 to the 1966 Record of Negotiations). It contained the following paragraph

> "Capital Assets
>
> The Nauruan Delegation proposed the purchase of the capital assets of the BPC at Nauru, the intention being that payment be made for these assets out of the financial benefits that the Nauruan people received from the industry over a period of ten years and that these assets be made available to the BPC for the operations at Nauru. The Joint Delegation indicated that it was part of the Partner Governments' proposal for a long-term agreement

that the capital assets would continue to be vested in the British Phosphate Commissioners" (emphasis added).

232. In the 1967 Nauruan/Partner Governments' negotiations, the sale of the BPC assets was mentioned in the Nauruan opening statement (Nauruan Document 67/1, pp.144-153, 1967 Negotiations, reproduced in Annex 5, Vol.3 NM). On 17 April 1967 the purchase of assets was discussed. A Nauruan paper of 14 April 1967 on the "Constitution and Role of the Extracting Authority at Nauru" was tabled which incorporated the sentence that "the assets of the BPC would be purchased by the Nauruans and held by the [Nauruan] corporation, paying over ten years with ownership passing before or soon after independence" (Working Paper 1, p.164, 1967 Negotiations).

233. Mr Warwick Smith after acknowledging that the Partner Governments had in 1966 wanted the assets to continue to be vested in the BPC, said that "the Partner Governments were agreeable now to the sale of the assets as part of a mutually acceptable total arrangement but agreement would depend on the future arrangements for the phosphate industry" (SR4, pp.90-93, 1967 Negotiations). In this and following meetings there were discussions about splitting the assets (rejected by the Nauruans), their valuation, how they were to be paid for and when ownership would pass, but at no stage was there any suggestion by the Nauruans that they were being forced to make an offer for them. Indeed on 18 May 1967 a Nauruan Delegation document "Phosphate Proposals by Nauruan Delegation" - repeated in paragraph 5 that "the Nauruan Delegation submits that the Partner Governments should sell the capital assets of the phosphate industry at Nauru to the Nauru Local Government Council ..." (Nauruan Document 67/8, pp.108-118, 1967 Negotiations). On 15 June 1967 a Heads of Agreement in respect of the Nauru Phosphate Agreement was signed by the Partner Governments and the Head Chief. Paragraph 6 dealt with capital assets, stating that "the Partner Governments undertake to sell and the Nauruan Local Government Council undertakes to buy the capital assets of the phosphate industry at Nauru" and set out certain arrangements in relation to those assets. On 14 November 1967 these provisions were formalised in Part III of the Nauru Phosphate Agreement (Annex 6, Vol.3, NM). It is thus incorrect to say, as the Nauruan Memorial puts it (para.498), that there was a "forced purchase of access to its own natural resources" and that the agreement "was extracted during the very sensitive period immediately prior to independence in January 1968". The purchase of the assets was proposed by the Nauruans themselves on 14 June 1966, ie 17 months before the final agreement was signed.

C. The Phosphate Agreement

234. On 14 November 1967 the Phosphate Agreement was signed in Canberra. It is reproduced as a schedule to the *Nauru Phosphate Agreement Ordinance 1968*, set out in Annex 9 to the Preliminary Objections. It formalised the Heads of Phosphate Agreement initialled on 15 June 1967. The main provisions were:

- Nauru phosphate would be supplied exclusively to the Partner Governments at a rate of 2 million tons per annum.
- The price would vary from year to year according to an agreed index.
- For the first three years the basic price would be $A11 per ton fob Nauru and if the Nauruan purchase of BPC assets was paid in full before 31 July 1970 the basic price for the third and subsequent year would be $A12 per ton.
- The Partner Governments would sell to the NLGC the capital assets of the BPC on Nauru.
- The assets would be valued at original price less depreciation at a rate consistent with the economic life of the assets. A joint team would establish the value of the assets.
- The NLGC would commence quarterly payments for the assets of no less than $750,000, commencing on 30 September 1967 with interest accruing at the rate of 6% on the unpaid balance.
- The NLGC would set up a body to be known as the Nauru Phosphate Corporation to manage the phosphate on behalf of the NLGC.
- For the first three years of the agreement the BPC would continue to manage the phosphate installations on Nauru.
- During the three year period there would be consultations for the transfer of management authority from the BPC to the Nauru Phosphate Corporation at the end of the third year.
- The Agreement would enter into force from 1 July 1967 and would remain in force for three years and thereafter indefinitely subject to certain conditions.

As with the Heads of Agreement there was no mention of rehabilitation. Subsequently, it was agreed that the value of the BPC assets would be $A21 million. That sum was fully paid by 18 April 1969.

D. The value of the 1967 settlement to the Nauruans

235. The real value of the 1967 settlement to the Nauruans is discussed in Part II, Chapter 2, Section VII, of this Counter-Memorial. The Nauruan financial situation at independence is also considered in that part of the Counter-Memorial. As well as the earlier study prepared at the time of the Preliminary Objections by the Centre for International Economics (Annex 26 to the Preliminary Objections), Australia includes with this Counter-Memorial a further study on the value of the phosphate industry that would have been paid by a purchaser in 1967 (Annex 1 to this Counter-Memorial). The analysis contained in these documents shows the 1967 phosphate settlement was, in fact, very generous to the Nauruans. Further discussion of this matter is postponed to the next Part of this Counter-Memorial.

PART II

THE ABSENCE OF A TENABLE CLAIM

CHAPTER 1

PRELIMINARY MATTERS

Section I: The elements of the dispute

236. In its judgment of 26 June 1992, the Court rejected Australia's preliminary objections that the Nauruan rehabilitation claim had been waived, or settled, when the Nauruan Trusteeship Agreement of 1947 was terminated by the United Nations General Assembly (*ICJ Reports 1992*, pp.247 and 253, paras.13 and 30). Accordingly, the claim concerning responsibility for rehabilitation comes before the Court for adjudication on the merits.

237. The claim which the Court is now to decide is thus quite specific. It is only a claim for rehabilitation (see paras.2 to 8 above). It does not involve (and cannot support) judicial investigation of allegations by Nauru that Australia failed to comply generally with its obligations with respect to the administration of the Territory. The Court itself has recognised this. As the Court observed in its judgment of 26 June 1992, resolution 2347(XXII) of 19 December 1967 (terminating the Trusteeship) was a resolution of "definitive legal effect" (*ICJ Reports 1992*, p.251, para.23). It was only given the "particular circumstances of the case", that the Court held that the "rights Nauru might have had in connection with the rehabilitation of the lands remained unaffected" (*ibid.* p.253, para.30).

238. Although the claim for rehabilitation is a limited one, Nauru fails to establish any adequate legal basis for it. In its search for such a basis, Nauru relies primarily on Articles 3 and 5 of the Nauru Trusteeship Agreement of 1947, and Article 76 of the United Nations Charter (NM, para.243). But it cannot point to any provision in these instruments which specifically enjoins an Administering Authority to restore lands used for mining during the period of trusteeship, or any like provision, for none exists. Instead, Nauru says that the alleged duty arose from "the existence of the trusteeship" "in the particular circumstances of Nauru" (NM, para.290).

239. Nauru thus admits that its claim is based on inference from certain quite general obligations and is almost entirely fact-dependent. Despite this, Nauru does not identify and marshal the facts or evidence on which it relies in any orderly way. Its case against Australia depends on broad generalisations and vague, but nonetheless highly prejudicial, impressions. Nauru's allegations so

lack particularity that it is, on occasions, virtually impossible for Australia to do more than guess the case which it must answer. For example, in referring to the basis for the alleged duty to rehabilitate, Nauru refers to two matters - the existence of an indigenous community on the island as a unit of self-determination, and the island's eventual uninhabitability if phosphate mining continued indefinitely (NM, para.290). But reference to these matters is unhelpful: as Nauru's coming to independence in 1968 shows, the Nauruan community has successfully exercised its right to self-determination. And since then it has lived on the island in continued prosperity and has itself chosen to mine (without there being any rehabilitation) more land than was mined prior to independence. Having regard to these facts it is impossible to see the supposed duty as "self-evident". Hence, these circumstances alone cannot found the basis of Nauru's claim against Australia. Australia is forced to gather the case against it as best it can.

240. Certain matters alleged by Nauru are clearly irrelevant to the specific claim for rehabilitation with which the Court is concerned. These include allegations relating to the pre-Trusteeship period. For Nauru says that it "does not make any claim in respect of breaches of the Mandate as such" (NM, para.287). Yet throughout its written and oral pleadings, Nauru has sought to rely on, and gives undue prominence to, the alleged misconduct of the Mandatory Powers, including Australia, during the period in which Nauru was a Mandated Territory. For example, it is said by Nauru that during the Mandate, the Australian administration on Nauru was motivated solely by the desire for Australian economic gain (NM, paras.29-35). But this allegation, though intended to prejudice Australia's case, cannot be at all relevant to a claim said to arise at a later date, ie, during the subsequent Trusteeship.

241. There are other similar allegations (eg NM, paras.56, 63, 78). But these highly coloured allegations must be disregarded, for they do not arise for determination in this case. Even if the Court were to find Australia responsible in some way for such acts, any such responsibility would necessarily be limited to the post-1947 Trusteeship period. See Part III, Chapter 2, Section 1.

Section II: The alleged basis of responsibility

242. Nauru alleges that:

(i) Australia's principal object in the administration of the Trusteeship was to exploit Nauruan phosphate for the benefit of the agricultural requirements of Australia, New Zealand and the United Kingdom (NM, paras.284, 332).

(ii) During the Trusteeship, the 1919 Agreement and the Lands Ordinance 1921 (as amended) were operated to establish a system which expropriated the rights of Nauruan landowners without adequate compensation. According to Nauru, the effect of the "legal regime overall, and the de facto position of the BPC" was that "the entire island and its resources" were placed at Australia's "effective disposition" (NM, paras.284, 323, 397); and the resulting legal regime "was fundamentally opposed to the giving of an appropriate degree of respect to the land rights of the indigenous inhabitants". In particular, Nauru alleges that the interest of the individual landowner was placed at the disposal of the BPC "subject to the payment of 'royalties' which were not the process of genuine negotiation 'at arm's length' and which were in any case unrelated to the real value of the resources being disposed of" (NM, para.397; see also paras.284, 299, 321, 371). Further, according to Nauru, there was a failure to return worked-out phosphate areas to landowners without undue delay and an absence of adequate procedure for deciding complaints arising from the unjustified retention of land by the BPC (NM, para.399).

(iii) During the Trusteeship, there was a substantial failure to provide funds for the normal purposes of administration. In particular, according to Nauru, public financial arrangements for Nauru were constituted entirely by the financial returns from phosphate mining (NM, paras.123, 125, 284, 368-70). The income of the BPC was not treated as public revenue, nor was it taxed as profits of a trading company (NM, paras.336, 373).

(iv) During the Trusteeship, the Administering Authority failed to make full and fair reports on the economic affairs of Nauru and the phosphate industry to the United Nations. The findings of the Trusteeship Council were "flawed by serious errors of fact induced by the misrepresentations of the Administering Authority" (NM, paras.281, 284, 315-6, 320-1, 339).

(v) During the Trusteeship, there was a failure on Australia's part to exercise the degree and form of governmental authority appropriate to the obligations of Trusteeship (NM, paras.284, 365).

243. But these claims, though also clearly intended to prejudice Australia's case, have no direct relationship to the issue of responsibility for rehabilitation. This was the only issue regarded as unsettled at the time of termination of the Trusteeship and which therefore survived the dispositive act of termination by the General Assembly. See *ICJ Reports 1992*, p.253.

244. Nauru's specific claim for rehabilitation cannot warrant a wholesale attack on, and judicial inquiry into, the entire United Nations Trusteeship administration on Nauru. It cannot by this case call into question the entirety of the colonial past. Given the dispositive act of the General Assembly in terminating the Trusteeship, there can be no question that the three Partner Governments discharged fully their obligations to the United Nations. In this case, the only relevant question concerns breach of an alleged obligation which required action in the form of rehabilitation, or some obligation which required the Administering Authority to make specific financial provision for rehabilitation.

245. Nauru's allegations concerning the BPC are relevant, if at all, only in so far as Australia is said to have incurred responsibility for breach of the supposed obligation, by reason of certain acts or omissions of the BPC. In this connection, Nauru is bound to establish that, in acting under the international instruments relating to the BPC which bound the three Partner Governments (in particular, the 1919 Agreement), Australia breached the supposed obligation involving action to rehabilitate, or the making of financial provision for rehabilitation.

246. Nauru does not, it must be emphasised, provide many details of the asserted legal basis of its claim that, by virtue of the legal and administrative arrangements for the Nauruan phosphate industry, Australia incurred responsibility to rehabilitate, or provide specific funds for rehabilitation. In earlier oral pleadings, it asserted that Australia should, as a matter of fairness, be required to rehabilitate lands worked out during the Trusteeship (CR 91/18, p.28). But this alone does not establish a legal basis for its claim. Uncertain notions of fairness cannot take the place of accepted legal principle, particularly where the dispute concerns a Trusteeship Agreement brought to an end apparently with the complete satisfaction of the United Nations.

247. Nauru seeks to manufacture from Articles 3 and 5 of the Trusteeship Agreement and Article 76 of the Charter an obligation which simply does not exist. There is nothing in the Trusteeship Agreement or the Charter which would have prevented Australia from allowing a venture, like the BPC, to operate in the Trusteeship Territory on the basis set out in the 1919 Agreement without undertaking some rehabilitation project.

248. It is not enough merely to state as Nauru has done that Australia failed to promote the political and economic advancement of the Territory, contrary to Article 76 of the Charter, or Articles 3 and 5(2)(b) of the Trusteeship Agreement (NM, paras.377, 392). Such a statement calls for analysis of a kind altogether lacking in the Nauruan Memorial. Nauru does not show how Australia's acts and omissions might have constituted a breach of such general obligations of result. For example, Nauru complains that the BPC phosphate-derived income was never taxed (NM, paras.336, 373). Under the 1919 Agreement, however, the BPC's revenue was used to fund the Nauruan administration. The BPC was not permitted to take Nauruan phosphate without making any return to the Nauruan community. On the contrary, it was required to make a substantial return. There is, therefore, no apparent substance to this complaint.

249. In the next Chapter, it will be shown that the obligations arising under Article 76 of the Charter, and the relevant Trusteeship provisions, are obligations of result (for example, to promote the economic advancement of the Nauruan people). The Administering Authority (including Australia) was given a discretion as to the choice of means by which the obligations were to be discharged. Neither the Trusteeship Agreement nor the Charter refers to any obligation to rehabilitate, or to provide the financial means for rehabilitation. And Nauru does not suggest that Australia incurred international responsibility simply by permitting the BPC to mine phosphate on Nauru during the Trusteeship period.

250. As the following Chapter also shows, until 1965 it was thought by the Nauruans, the Administering Authority and the United Nations that the most appropriate way to secure the long-term future of the Nauruan people was by way of resettlement. Rehabilitation was not then considered to be a practicable option (and there cannot have been a duty on the part of the Administering Authority to do something which was then believed impracticable).

251. Towards the end of 1964, however, the Nauruans decided to reject resettlement as an option, so that the Administering Authority was obliged to

consider alternative means to provide for their long-term future. The question of rehabilitation was further investigated and was again found not to be feasible. Expert scientific inquiry could not yield any assured, practicable method of rehabilitation. Even if such a method had been found, there would have been too little time for the Administering Authority to undertake any rehabilitation scheme before Nauru itself became independent. As the Nauruans' own more recent inquiry has shown, even with advances in scientific and technical know-how, no useful rehabilitation scheme can proceed until a comprehensive land-use plan has been formulated. See Part III, Chapter 1. Such a plan had not been formulated by the Nauruans prior to independence and has not been formulated since.

52. The next Chapter will show that it was in this context that the Administering Authority's preferred means was to make sufficient financial provision for the Nauruan people that they might undertake to rehabilitate the worked-out phosphate lands, if this happened to become practicable and if they so chose. Adequate financial provision was, therefore, made by the Administering Authority, by means of the 1967 Canberra Agreement. See Part II, Chapter 2, Section VII. The question therefore becomes whether or not this choice of means was an abuse of the discretionary powers given to the Administering Authority under the Trusteeship Agreement and the Charter, so as to constitute a breach of a duty arising under those international instruments. The duty was, of course, the general duty under Article 76 to promote the advancement the inhabitants, not the duty alleged by Nauru to rehabilitate.

253. As the following Chapter shows, the terms of the 1967 Canberra Agreement were fully reviewed by the Trusteeship Council and the General Assembly. The evidence shows that neither the Trusteeship Council nor the General Assembly considered that the choice of means selected by the Administering Authority was inappropriate, much less improperly motivated. It was after that review that the General Assembly decided to terminate the 1947 Trusteeship Agreement and to grant the Nauruans full independence and control of their own affairs. The only possible basis for challenge by Nauru is that the 1967 Canberra Agreement did not constitute a bona fide exercise of power, because the financial provision made by it was totally inadequate. But this clearly is not the case (Chapter 2, Section VII). Indeed, Nauru itself admits that it has sufficient funds to undertake rehabilitation.

254. In effect, Nauru's claim is that the Administering Authority ought to have given it a fund which was specifically committed to rehabilitation, irrespective of the general financial provision made available to Nauru under the Canberra Agreement. This claim is not only unreasonable, it is altogether incompatible with the general discretion entrusted to the Administering Authority under the Trusteeship Agreement and the Charter.

255. Besides the Trusteeship Agreement and the Charter, Nauru also alleges that it has other legal bases for its claim in associated principles of general international law; in particular, the principles of self-determination and permanent sovereignty over natural wealth and resources (NM, paras.44-5, 419). These principles cannot, however, be invoked to change the obligations imposed by the Charter and the Trusteeship Agreement. See Part II, Chapter 3 below. Even if guides to the interpretation of those obligations, their application is subject to the notion of "intertemporal law", discussed in the next section.

256. In any event, the facts leave little scope for the operation of the principles of self-determination and permanent sovereignty. The mining of Nauruan phosphate was constantly under review by the relevant organs of United Nations. It took place not only with their consent, but also with that of the Nauruan people. Prior to 1965, neither the United Nations nor the Nauruans gave any serious thought to the possibility of rehabilitation. By independence, the Administering Authority had transferred all interest, and control over, the phosphate industry to the Nauruans (on terms most favourable to them). See Part II, Chapter 2, Section VII. Indeed, since 1968, Nauru itself has chosen to continue to mine at an even greater rate, without rehabilitating the land. Surely, principles of self-determination and permanent sovereignty over natural resources cannot impose a higher obligation of conduct on the Administering Authority than Nauru has thought appropriate to accept for itself. These principles are simply not relevant to the question, "who bears the cost of rehabilitation?"

257. Apart from principles of self-determination and permanent sovereignty over natural resources, Nauru also relies on doctrines of denial of justice *lato sensu* and abuse of rights (NM, paras.439, 449), as well as the so-called duties of a predecessor State. Notwithstanding the apparent breadth of these grounds, they cannot enlarge the dispute beyond what is already claimed - a declaration as to responsibility for rehabilitation. None of the allegations made

in relation to these supposed bases of claim touch or concern this issue. See Part II, Chapter 3.

258. In any event, the allegations made by Nauru in this context (examined in Part II, Chapter 3) are entirely inconsistent with the judgments made by the relevant United Nations organs during, or at the termination of, the Trusteeship Agreement. Generally speaking, these organs commented most favourably on the efforts of the Administering Authority to discharge its duties as such. Furthermore, as Chapter 3 also shows, Nauru's assertions concerning the scope and application of these doctrines have little or no authoritative support. These asserted doctrines are incapable of providing separate causes of action.

Section III: The intertemporal issue

A. THE LEGAL PRINCIPLE

259. The determination of the validity of the Nauruan claims must be made by reference to the state of international law at the time the relevant acts in question were committed and the facts that gave rise to the alleged breaches of international law occurred. This is a fundamental proposition which must remain at the forefront of consideration of the legal issues raised in this case. The Court itself has already recognised the need to ensure that Nauru's delay in seising the Court does not cause prejudice to Australia with regard to determination of the applicable law (*ICJ Reports 1992*, p.255, para.36).

260. As proclaimed by Max Huber in the *Island of Palmas* case:

> "a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled." ((1928) 2 UNRIAA 831 at 845)

As was also said in that case:

> "As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law) a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued

> manifestation, shall follow the conditions required by the evolution of law." (Ibid)

In this case, therefore, Nauru not only has to establish the existence of a right to rehabilitation at some stage during the Trusteeship, it has to show that that right continued to exist and that it still exists today.

261. In order to determine the wrongfulness of an act of a State it is essential to judge that conduct on the basis of the law as it was interpreted and applied at the time the allegedly unlawful conduct was performed. To judge the conduct of Australia in the light of the law as it may have evolved subsequently would be an attempt to apply the new law retroactively, in violation of fundamental principles of justice.

262. This intertemporal principle has been proclaimed and codified by the International Law Commission's draft articles on State Responsibility. Article 18 reads:

> "An act of the State which is not in conformity with what is required of it by an international obligation constitutes a breach of that obligation only if the act was performed at the time when the obligation was in force for that State."

263. In the commentary to this Article the ILC supported the rule with the consideration that "the principle that an individual cannot be held criminally liable for an act which was not prohibited at the time when he committed it (*nullum crimen sine lege praevia*) is a general rule of all legal systems". In finding that the principle applies in international law, the report adds that it provides a safeguard for all subjects of law "since it enables them to establish in advance what their conduct should be if they wish to avoid a penal sanction or having to pay compensation for damage caused to others" ([1976] YBILC, Part.II, Vol.II, p.90).

264. The application of the principle to tortious and criminal responsibility is recognised by H Lauterpacht, *International law*, Vol.I, the General Part, p.133; G Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, Vol.I, (1957) p.24. A related principle applies in relation to treaties, to the effect that they will not normally bind a party in relation to an act or fact which took place before the date of entry into force of the treaty (Vienna Convention on the Law of Treaties, Art.28).

265. A further aspect of the intertemporal principle is its application to terms used in treaties. As the International Law Commission recognised "the effect of changes in the law upon a treaty is rather a question of the application of the new law to the treaty - a question of the modification of the rule laid down in the treaty by a later legal rule rather than one of the interpretation of the terms" ([1964] YBILC 1964, Vol.II, p.203).

266. The 1971 *Namibia* advisory opinion may at first glance appear to contradict this principle. In that case the Court stated that "viewing the institutions of 1919, the Court must, when considering Mandate obligations, take into consideration the changes which have occurred in the supervening half century, and its interpretation cannot remain unaffected by the subsequent development of law" (*ICJ Reports 1971*, p.31, para.53). The Court stated that the concepts of the Mandate, including that of the "sacred trust" "were not static, but were by definition evolutionary" (ibid). However, in any attempt to apply that decision to this case, it must be recalled that the Court was then judging the contemporary conduct of South Africa which continued to apply apartheid in 1971 in the territory of Namibia and did not report to the General Assembly. Here, the situation is entirely different.

267. Nauru wants the Court to judge not the conduct of a State at the time of judgment based on continuing behaviour, but the conduct of the Administering Authority over a lengthy period prior to 1967. They want this conduct judged by reference to legal concepts which were evolving throughout the time the relevant conduct took place and some of which have evolved considerably subsequently. Claims arising out of conduct that took place as long ago as 1947 cannot be determined on the basis of emergent principles of international law that were not established by 1967 or, even if established by then, were not applicable to all the earlier conduct. Even if in this case the Court considers that certain obligations under the Trusteeship or general international law evolved with subsequent development of the law, this does not mean that such developments of the law apply to earlier acts committed prior to the development of the law. To do so would clearly be contrary to the statement of the rule by Judge Huber concerning the legal appreciation of facts.

268. The application of later legal rules to treaty provisions relevant in this case is discussed in greater detail elsewhere in this Counter-Memorial. At this stage Australia simply reaffirms that the application of a treaty, in the same way as the determination of international responsibility, must have regard to the law

in force at the time the relevant acts were committed. And the fact that one is dealing with a Trusteeship arrangement does not affect this conclusion.

269. The Australian Government rejects the implication in various parts of the Nauruan Memorial (see eg NM, paras.422-429) that the Court should determine the legal claims by reference to developments in moral, social and legal values subsequent to the events which gave rise to the claims alleged.

B. APPLICATION OF THE INTERTEMPORAL PRINCIPLE TO THE FACTS

270. The Nauruan claim relates to the alleged failure of Australia to make adequate provision for the restoration of the area mined for phosphate prior to 1967. It is clear that the various grounds on which Nauru seeks to rely relate to actions over the twenty year period from 1947 to 1967, not simply the position as at 1967.

271. It is the conduct of the Administering Authority throughout the Trusteeship which, it is alleged, gave rise to a breach of a duty to rehabilitate, or to provide the financial means to enable rehabilitation to take place. Whether such an obligation existed and was breached depends on the legal principles applicable throughout the whole trusteeship period, and only on those principles.

272. Even if, as the *Namibia* case suggests (see para.266 above), and Nauru itself submits (NM, para.423ff), it is appropriate to interpret the Charter and the Trusteeship Agreement itself in a dynamic way, this does not enable the Court to interpret those provisions on the basis of the law as it has evolved since 1967. For to do that would be to misunderstand the nature of the obligation alleged and the basis for it: it is alleged that there was an obligation to rehabilitate mined areas arising out of the Trusteeship as such. And this can only be because at the time of independence some trusteeship obligation had not been fulfilled.

273. The claim made by Nauru against Australia is, in substance, that when the Nauruans rejected resettlement at the end of 1964, the Administering Authority became obliged to rehabilitate. For clearly there could be no question of rehabilitation if the island was, with the consent of the inhabitants, to be abandoned. It was only when the Nauruans made the decision to remain that the question of rehabilitation really arose. From the perspective of the United Nations and the Administering Authority, the Administering Authority was

under an obligation to provide for the welfare of the Nauruan people. Prior to 1964, the United Nations, the Administering Authority and the Nauruans were all agreed that resettlement was the best means to fulfil this obligation. It was not until the Nauruans rejected resettlement that rehabilitation was seriously considered as an alternative. As already noted, however, the Administering Authority regarded rehabilitation as impracticable and, in any event, time did not permit the Administering Authority to carry out actual rehabilitation. In this circumstance, the Administering Authority had no alternative but to make adequate financial provision for the future of the Nauruan community. Intertemporal principles would require these circumstances to be taken into account.

274. In light of these facts, the real question raised by Nauru is whether the arrangements made by the 1967 Canberra Agreement were in fact a bona fida exercise of the discretion of the Administering Authority. In these circumstances, the onus is on Nauru to show either that the 1967 Canberra Agreement was totally inadequate, or that the funds made available to the Nauruans by that Agreement somehow excluded financial provision for rehabilitation.

275. Nauru cannot avoid this conclusion by relying on general principles of international law, such as principles of self-determination or permanent sovereignty over natural resources as they might be applied to a situation today. Similarly, intertemporal law prevents recourse, in this case, to the newer, post-1967 notions of the "polluter pays principle", or the notion that an extractive industry must re-instate an area mined. In relation to the latter, there was at the time no such generally acknowledged duty in Australia, United Kingdom or New Zealand or elsewhere. For instance, in French law a duty to rehabilitate did not appear in the Mining Code until 1977 (loi no.77-620 of 16 June 1977, Art.20 amending Art.83[5]). See also the situation in Togo described in Alaglo, "Togo, its geopotential and attempts for land-use planning" in P Arndt and G W Lyttig (eds), *Mineral Resources Extraction, Environmental Protection and Land Use Planning in the Industrial and Developing Countries*, pp.260 ff. This indicates that rehabilitation of mined phosphate areas did not occur. Nor is there evidence of any duty to rehabilitate mined-out lands in international environmental instruments adopted before 1967. To apply these

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[5] Article 83 nouveau: "La remise état, notammment à des fins agricoles, des sites et lieux affectés par les travaux et par les installations de toute nature réalisés en vue de l'exploitation et de la recherche, peut être prescrite; elle est obligatoire dans le cas des carrières".

notions here would be to apply retrospectively to the Administering Authority values, standards and obligations to which it was not subject at the relevant time.

276. Finally, as already noted, Nauru makes no claim of breach in respect of the Mandate period. It follows that Nauru's claim is in respect of phosphate land mined out during the Trusteeship only, excluding the area of the island mined prior to 1947. (Approximately twenty-five per cent of pre-independence mining occurred before the Trusteeship was established in 1947.) If the case were otherwise, the Administering Authority under the Trusteeship Agreement would incur an obligation in respect of acts for which it was not as such responsible, undertaken under a quite different legal regime. This would also introduce elements of retrospectivity incompatible with intertemporal law.

Section IV: Relationship between the Trusteeship and 1919 Agreement

277. Before turning to examine the nature of the trusteeship obligations, it is necessary to deal with one other matter raised by Nauru, the relationship between the 1919 Agreement and the Trusteeship. Nauru contends that the supposed violations of the trusteeship obligations by Australia "in virtually every case flow from the system inherited in 1947" (NM, para.286; see also para.283). This refers particularly to the regime established by the 1919 Agreement. Australia notes that the status quo under the 1919 Agreement was known to the United Nations at the time of the adoption of the Trusteeship Agreement. There was no suggestion in that latter Agreement that the previous arrangements governing the phosphate industry (and made under the 1919 Agreement) were in any way incompatible with the trusteeship system which was a continuation of the basic mandate principle of the "sacred trust".

278. Australia rejects for the reasons already set out (paras.240 to 242 above) the Nauruan suggestion that events during the Mandate period have some "legal and evidential significance" for these proceedings (NM, para.287). In these proceedings it is only conduct during and particularly at the end of the Trusteeship that is relevant. The Nauruan contention in relation to evidence from the Mandate period conflicts, in any event, with other parts of the Nauruan Memorial that seek to rely solely on evidence from 1965-1967 (NM, para.274).

279. The Court must look at the evidence before it covering the Trusteeship period. This includes the provisions of the 1919 Agreement so far as they were relevant to the phosphate mining during that period. It is clearly impermissible,

however, to extract from conduct in the 1920s conclusions as to the nature of conduct in the 1960s. Yet this Nauru seeks to do.

280. So far as the 1919 Agreement is relevant to the Trusteeship period, Australia does not, in these proceedings, find it necessary to rely on Article 80 of the Charter in order to argue that its actions in conformity with the 1919 Agreement between the Partner Governments (under which the phosphate mining took place) overrode any possible obligation under the Trusteeship Agreement to rehabilitate. Australia, of course, denies that such an obligation existed. Australia in the Trusteeship Council did, when the issue of the consistency of the two Agreements was raised, on occasions refer to Article 80. Australia agrees with Nauru, however, that the 1919 Agreement "left it open" to Australia to comply with its trusteeship obligations (NM, para.514). That Agreement was, as Australia itself recognised, no more than an "administrative instrument" between the three Partner Governments laying down in part practical provisions for the mining of phosphate by a commercial instrumentality of those governments.[6] The 1919 Agreement is not relevant to whether any requirement to rehabilitate arising from trusteeship was breached.

281. The fact that the United Nations knew of the 1919 Agreement is, however, relevant to any question whether Australia's actions generally in relation to the phosphate industry were consistent with its trusteeship obligations. This strongly suggests that its provisions were not regarded by the United Nations as inconsistent with the trusteeship obligations. It would be an extraordinary proposition to suggest that the United Nations approved the Nauruan Trusteeship knowing full well the basis on which the phosphate operations on the territory were to take place if it considered that operation opposed to the fundamental objectives of the trusteeship system. Nor would the United Nations have continued to supervise that system over twenty years without rectifying such a supposedly serious failure. The Nauruan case to the contrary necessarily calls into question the integrity of the United Nations supervisory mechanisms. As the then Australian Solicitor General said in his paper prepared for the purposes of the 1965 round of negotiations, "it is inconceivable that a provision limiting the rights of, or the grant of rights to, the Commissioners would not have been included in the Trusteeship Agreement, if

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[6] In the Trusteeship Council in 1949, the representative of Australia said in relation to the 1919 Agreement that "a study of that document would show that its aim was to lay down practical provisions for the mining of phosphates. Thus the Agreement of 1919 should not be considered an organic law but an administrative instrument". United Nations, *Trusteeship Council Official Records, 5th Session*, 8th meeting, 27 June 1949.

the United Nations had intended to impose such a limitation" (reproduced in Vol.3, NM, p.188-9).

282. Australia does not consider it necessary to take a position on the Nauruan contention that the trusteeship principles have the status of *jus cogens* (NM, para.254). As indicated, Australia does not seek to say that the 1919 Agreement overrides the trusteeship system. And there can be no suggestion that the Trusteeship Agreement itself is in some way inconsistent with the alleged *jus cogens* principles. For that would be to make a nonsense of the whole trusteeship system. So one is left with the need to apply the trusteeship principles of the Charter and the specific obligations of the Trusteeship Agreement to the facts of the case. No decision on the status of these principles and obligations as *jus cogens* is, therefore, necessary. Australia does not, therefore, respond further to this particular claim.

CHAPTER 2

NOVEL ALLEGATIONS OF BREACH IN RELATION TO THE CLAIM FOR REHABILITATION DERIVING FROM TRUSTEESHIP

Section I: The nature of the obligations of the Administering Authority

283. Any consideration of the claim that there is a duty to rehabilitate flowing from trusteeship obligations must have regard to the nature of those obligations. Australia does not deny that legal obligations do in certain circumstances arise under the trusteeship system. The Court in the 1971 *Namibia* advisory opinion indicated in relation to the Mandate that "definite legal obligations" arose designed for the attainment of the object and purpose of the Mandate (*ICJ Reports 1971*, p.30). And Australia does not deny that this general proposition also applies to the Nauru Trusteeship Agreement.[7]

284. But it is the terms of the Charter and the particular Trusteeship Agreement which must alone determine the content of any obligations which arise from those instruments.

A. OBLIGATIONS OF RESULT

285. The obligations that arise under Article 76 of the Charter are defined in terms of the "objectives" to be achieved (what can be termed obligations of result: see Report of the International Law Commission, [1977] YBILC Vol.II Part 2 at pp.18-30). The obligations are not defined in terms which specify the precise means to be employed by the Administering Authority to achieve a specified result. In consequence, the Administering Authority is left with considerable discretion as to the choice of means, provided the end result is achieved. This is significant in the present case, for there can be no doubt that the ultimate result envisaged by the trusteeship system was achieved: Nauru became independent and the people prospered. And at no stage did the

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[7] Australia, at the time of conclusion of the Trusteeship Agreement for Nauru, conceded that Article 76(d) of the Charter imposed a binding obligation on the Partner Governments. The records state: "In reply to questions raised by the delegations of India and China, the Australian delegation affirms that Article 76(d) of the Charter is accepted by the Delegations of Australia, New Zealand and the United Kingdom as a binding obligation in relation to the Trusteeship Agreement for Nauru, it being also noted that in accordance with the terms of Article 76(d) the welfare of the inhabitants of Nauru is of paramount consideration and obligation" (United Nations, *General Assembly Official Records, 2nd Session, Fourth Committee*, Report of Sub-Committee 1, Doc A/C.4/127).

supervisory bodies within the United Nations express the view that, in its choice of means, the Administering Authority was in breach of its legal obligations (see Part I, Chapter 4 above).

286. The International Law Commission has recognised a distinction between "obligations of means" and "obligations of result". This distinction is reflected in draft Articles 20 and 21 of the articles on State responsibility adopted by the Commission in 1977. There is nothing in the relevant trusteeship obligations which requires a particular course of conduct by the Administering Authority. They are rather quintessential obligations of result. They require, for instance, the promotion of the well-being of the inhabitants. The means by which an Administering Authority achieves that is a matter for its own choice.

287. As the International Law Commission recognised in its commentary there are some obligations of result where, even if the initial choice of means has not achieved the required result, a State may avoid a breach of the obligation by subsequent adoption of alternative means (see draft Art.21(2)). This may involve achieving the result required or in some cases, where the nature, purpose and field of application of the obligation allows, an equivalent result. (See generally the commentary to the ILC Draft Art.21 [1977] YBILC Vol.II, Part 2 pp.18-30; also reproduced in I Brownlie, *State Responsibility* (1983) pp.254-276). See also the Sixth Report on State responsibility by Professor Ago, [1977] YBILC. Vol.II, Part 1, pp.8-20.

288. Nauru seeks to find a breach of trusteeship in certain actions of the Administering Authority (NM, para.289-302). But in doing this Nauru overlooks the fact that the obligations contained in Article 76 of the Charter and the Trusteeship Agreement are obligations of result. None of those provisions required Australia to act in any particular way to meet the obligations. Rather, the Trusteeship Agreement, in particular, recognised that the obligations on the Administering Authority to "promote", for instance, advancement of the inhabitants or to assure to the inhabitants an increasing share in the services of the territory were to be met by action chosen by the Administering Authority having regard to the "circumstances of the Territory" or the "particular circumstances of the Territory and its people" (Art.5(2)(b) and (c) respectively of the Trusteeship Agreement). As well, Article 3 of the Trusteeship Agreement required the Administering Authority to administer the territory "in such a manner as to achieve" the basic objectives of the trusteeship.

289. It follows that the failure to rehabilitate cannot in itself constitute a breach of any international trusteeship obligation, given the absence of any such specific requirement in the trusteeship provisions. Nauru must establish that, by Australian actions and conduct in failing to rehabilitate, and given the alternative means adopted, Australia in some way failed to achieve an outcome required under the Trusteeship. Unless it can do this no possible breach could be established.

290. More importantly, even if it could be established that Australia's actions from time to time failed to meet a trusteeship obligation requiring rehabilitation, Nauru must also show that the failure to achieve the result required by that obligation continued as at independence despite the adoption of alternative means to achieve the obligations of result, namely the favourable phosphate settlement which included the complete transfer to Nauru of the phosphate industry and the trust funds then in existence. Because the relevant obligations are obligations of result, subsequent conduct was clearly envisaged in the circumstances as allowing a trusteeship State to achieve the results required of it. (See draft Article 21(2) of the ILC draft Articles on State responsibility.) Nauru would still, therefore, have to show that the terms on which independence was granted failed to achieve a result equivalent to that result which previously may have been considered to require rehabilitation or a fund specifically committed to rehabilitation.

291. By their supervision and recommendations United Nations bodies could clearly indicate to an Administering Authority what action was necessary to meet a particular trusteeship obligation. And in Australia's case, it paid careful regard to the recommendations of the United Nations and adjusted its behaviour accordingly (see paras.92 to 106 for examples). It is for this reason important that any consideration of Australian responsibility for rehabilitation have regard not to individual acts during the trusteeship but to the situation as at independence when Australia relinquished any further administrative responsibility. Even if particular actions during the Administration did not fully meet trusteeship obligations, it is only if a relevant breach can be established having regard to the situation at independence that Nauru could succeed. And it can only do this if it can successfully show that, instead of rehabilitation, the ultimate means chosen by the Administering Authority to ensure the well-being of Nauru did not in fact satisfy the relevant obligations. In reality this means that Nauru must show that the means chosen by the Administering Authority - the provision of finance under the 1967 arrangements - were totally inadequate to

achieve rehabilitation. But this cannot be so. Nauru admits it has the financial means. For this reason, Australia strongly denies that Nauru can establish a breach on the facts quite apart from the difficulties that exist in establishing any legal bases for its claim. In effect Nauru claims that it was entitled to earmarked funds, assigned specifically to rehabilitation and irrespective of the general wealth of the Nauruans under the 1967 arrangements. This is not only patently unreasonable, but it is unsupportable as a restriction on the general discretion entrusted to the Administering Authority.

B. DOMESTIC LAW ANALOGIES

292. Another important consideration is that, in considering the nature of the obligations of the Administering Authority, it is the actual provisions of the Charter and Trusteeship Agreement to which the Court must have regard. Australia rejects the attempt by Nauru to import into these treaty provisions the whole set of legal rights and duties connected with the notion of a "trust" in domestic law, particularly the common law. To do that is to mistake completely the fundamental elements of the United Nations Trusteeship System. Domestic law analogies have limited value in this area. The Court recognised the difficulty in equating domestic systems with the international mandate and trusteeship system in the *Status of South West Africa (Advisory Opinion) (ICJ Reports 1950*, p.132):

> "The League was not, as alleged by that Government [South Africa], a 'mandator' in the sense in which this term is used in the national law of certain States. It had only assumed an international function of supervision and control. The 'Mandate' had only the name in common with the several notions of mandate in national law. The object of the Mandate regulated by international rules far exceeded that of contractual relations regulated by national law. The Mandate was created, in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international object - a sacred trust of civilisation. It is therefore not possible to draw any conclusion by analogy from the notions of mandate in national law or from any other legal conception of that law."

293. Similarly, Judge McNair in his separate opinion in that case pointed to the inappropriateness of seeking to apply private law institutions directly to an international institution. He said:

> "What is the duty of an international tribunal when confronted with a new legal institution the object and terminology of which are reminiscent of the rules and institutions of private law? To what extent is it useful or necessary to examine what may at first sight appear to be relevant analogies in private law systems and draw help and inspiration from them? International law has recruited and continues to recruit many of its rules and institutions from private systems of law. Article 38(i)(c) of the Statute of the Court bears witness that this process is still active, and it will be noted that this article authorises the Court to 'apply ... (c) the general principles of law recognised by civilized nations'. The way in which international law borrows from this source is not by means of importing private law institutions 'lock, stock and barrel', ready-made and fully equipped with a set of rules. It would be difficult to reconcile such a process with the application of 'the general principles of law'. In my opinion, the true view of the duty of international tribunals in this matter is to regard any features or terminology which are reminiscent of the rules and institutions of private law as an indication of policy and principles rather than as directly importing these rules and institutions" (p.148).

294. It is important to note the use to which Judge McNair would put private law analogies: it was only as "an indication of policy and principles". It was not to import the private law rules and institutions. The "international institution" of trusteeship must be defined by reference to its own rules. Australia therefore rejects completely the relevance of the Appendix by Professor Honoré in the Nauruan Memorial. That Appendix examines in some detail trust and trust-like institutions in domestic legal systems and makes the mistake warned of by Judge McNair of seeking to import directly the content of private law rules applicable to a particular domestic law concept. In addition, the Appendix looks selectively at only one relevant analogy, that of the "trust". The inappropriateness of selecting this analogy is highlighted by an examination of mandates established under Article 22 of the Covenant, the predecessor to the United Nations trusteeship system. As was recognised by Quincy Wright in his 1933 study of mandates, resort to domestic law analogies in relation to Article 22 of the Covenant was made difficult by the fact that three words with different legal meaning were used: mandate, tutelage and trust. He concluded that there was little evidence that the word "trust" was used in a technical sense; by contrast, there was considerable evidence that the word "mandate" was so used. (*Mandates under the League of Nations* (1933) pp.375-390, esp at 377). It

would be equally a mistake to read the reference to "trust" in the United Nations Charter in a technical, private law sense as referring to "trust" in the common law. Nauru points to no evidence that it should be so construed. Nor do the negotiations of these provisions at the time of the San Francisco Conference support the conclusion for which Nauru contends. As is said by Kelsen, an "institution of public, especially of international, not of private, law is intended" (H Kelsen, *The Law of the United Nations* (1951) p.566). And as Lauterpacht, who was sympathetic to use of domestic law analogies in international law said of the Mandate system, "(T)he technicalities, exceptions and historical peculiarities of any given system of private law have no application in the interpretation of mandates." (*Private Law Sources and Analogies in International Law* (1927) p.200; see also C Rousseau, *Droit international public*, Vol.II (1974) p.380.)

295. Even if one examines the Honoré appendix, with a view to seeing if any policy and principles might be imported into the international institution, one finds little assistance. The conclusion of the Appendix is that there is a "pervasive use of protective institutions" in domestic law systems. Persons holding an office under these institutions are normally subject to supervision by some other body, often a court. But it is difficult to generalise as to the precise duties of a trustee. As Honoré acknowledges (Appendix para.20, Vol.1, NM, p.361, NM) the terms of the trust instrument set out the power and duty of the trustee and normally these terms can vary so long as they are not unlawful or *contra bonos mores*. This reinforces the fact that the trusteeship system created by the Charter depended very much on the terms of individual trusteeship agreements to determine the precise obligations of an Administering Authority. The Charter also established an elaborate system of supervision, the "securities for performance" already mentioned. To this extent one might acknowledge that the trusteeship system is analogous to protective institutions in private law.

296. Nauru seeks in addition, however, to import on to the international plane a general "duty of loyalty" and an "intense" fiduciary duty applicable in all trust situations, which it is said requires the administration of the trust solely in the interest of the beneficiaries (Honoré Appendix para.21, Vol.1, NM, p.361). But to rely solely on the intense fiduciary duty applicable to trustees in domestic law is to state the notion of fiduciary duty too absolutely. As Wright said:

> "The terms 'trust' and 'entrusted' were used to emphasize the fiduciary character of the relations of both League and mandatory to

> the mandated peoples rather than to import into the institution the English law of strict trusts." (p.389)

297. And as is stated in a leading Australian text: "The trust is a fiduciary relation, but every fiduciary relation is not a trust" (*Jacobs' Law of Trusts* (5th ed 1986), p.10). A fiduciary duty operates in a wide range of situations and varies in its content depending on the situation. One can in certain circumstances have a fiduciary duty without at the same time being precluded from pursuing one's own interest. For instance, in a number of English cases limits on the application to a fiduciary of the principle that a person must not put himself in a position where interest and duty conflict have been recognised. Hanbury and Maudsley, *Modern Equity* (12th ed 1985), say:

> "But it is not safe to make the attractive over-simplification of saying that a fiduciary must always account for all gains which come to him by reason of his fiduciary position." (p.577)

This emphasises the need for caution in any attempt to generalise and draw absolute rules that should apply to the actions of a trusteeship authority on the international law plane.

298. The need for caution in translating rules from the private law area into international law is underlined by the essentially different nature of the relationship. In a private law trust one is normally dealing with a business or personal relationship involving limited and identified property or assets. By contrast, under a trusteeship under the Charter one is dealing with the discharge of a complete range of governmental functions on behalf of a whole self-determination unit. The two situations are not comparable. In this context it needs to be remembered that it is the duties of the Administering Authority as trustee that are alleged to be breached. It is not alleged that the BPC itself was a trustee. In fact, Nauru says that the BPC is in the same position as any private trading enterprise. Yet it appears to allege that the benefits gained by the Partner Governments through their ownership of the BPC in some way should be equated with and treated as actions in conflict with a fiduciary duty imposed on them in their capacity as administrators of the territory. This is to confuse two separate roles. Throughout the Mandate and Trusteeship the different roles and responsibilities of the three Governments as Administering Authority and as owners of the BPC were recognised and accepted. For Nauru to suggest otherwise is to ignore the way in which the United Nations treated the operations of the BPC (see paras.108 to 119 above). To read the trusteeship

provisions as carrying the corollary that the mandate or trustee powers could not benefit from the resources of the territories in question through a commercial entity would be to ignore the widespread practice of Administering Powers under both the League and the United Nations. In the case of Nauru, the lack of any logical basis for saying that such an arrangement infringed some fiduciary duty which thus supports an obligation to rehabilitate is highlighted by a review of the salient facts.

299. The grant and extension of mineral concessions to foreign concerns in mandate and trust territories was an accepted feature of their administration. The League of Nations in particular accepted the practice of the Partner Governments in relation to Nauru. As Professor Quincy Wright said speaking of Nauru:

> "Does the principle of gratuitous administration prohibit the mandatory from engaging in business for profit in the mandated area? Apparently not. The Commission has distinguished between the mandatory government in that capacity and in the capacity of a private entrepreneur." (Wright, *Mandates under the League of Nations* (1933) at pp.453-4.)

300. Nauru in effect attempts to impose some additional obligation on the exploitation of Nauru's resources in order to found a duty to rehabilitate. It attempts to impose obligations which would have the effect that an Administering Authority could not promote the economic advancement of a trust territory through exploitation of its resources, or could only exploit subject to prohibitive conditions. This attempt to create some ideal model of a "sacred trust" gets no support from an examination of the trusteeship system in practice.

301. In the context of United Nations trusteeship, one can conclude that the basic notion of a "sacred trust" may well involve certain fiduciary duties on an Administering Authority. And it is this general principle, rather than any specific rule applicable to a trustee as such, that might be imported into international law. The content and nature of such a fiduciary duty can vary considerably. Its content can only be determined by a consideration of the actual circumstances governing the relationship. And if one examines the situation in this case, the only reasonable conclusion that one can reach is that while the nature of the trusteeship relationship imposed an obligation to have regard to the interests of the people of Nauru, as reflected in Article 76 of the Charter and the

Trusteeship Agreement, it did not impose a duty to act solely in the former's interest.

302. The "open door" embodied in the former "A" and "B" mandates is not absolute under the trusteeship system. It is:

> "subordinated by the Charter and Trust Agreements to the interests of the inhabitants.... The Charter provides (Art.76(d)) that 'equal treatment in social, economic, and commercial matters for all Members of the United Nations and their nationals' (and also for the latter in the 'administration of justice') shall be 'without prejudice' to 'political, economic, social and educational advancement of the inhabitants of the trust territories' as well as the other basic objectives. This is an important change which gives the Administering Authority much more freedom of action to safeguard the interests of the population which may coincide in certain cases with its own interest." (Duncan Hall, *The Trusteeship System* (1947) 24 BYBIL 33, 68).

303. The Administering Authority secured from the BPC the costs of the administration of Nauru, as well as royalty payments. It emphasised to the United Nations the difference between its responsibilities for administration and the commercial role of the BPC (see para.306 above). And given this, the Administering Authority properly met its duty to have regard to the interests of the Nauruans in ensuring that the royalties and administration expenses were provided from the BPC operations. Australia rejects the Nauruan assertion that the exclusive object of the Administering Authority was the exploitation of the phosphate deposits for their own benefit. There was no necessary incompatibility, in any event, between its interest in exploitation of the phosphate and the Nauruan interest in development of employment opportunities and the general prosperity that mining brought. The well-being of the Nauruan people was conscientiously ensured in terms of social, economic and political advancement. This was guaranteed by the financial aspects of the phosphate agreement and the transfer of the trust funds (see paras.242 to 243 above).

304. The Nauruan argument if upheld must mean that Nauru is not only accusing Australia of a breach of trust, but also accusing the United Nations itself of not being diligent enough. Because, if the preceding argument is not accepted and domestic law "trust" analogies are considered directly relevant, it is clear that the real "trustee", with the obligations which are said to be

incumbent on such a person, is not the Administering Authority but the United Nations itself. The Administering Authority was no more than a representative or delegate of the United Nations. (See M Glele-Ahanhanzo, "Article 76" in J-P Cot et A Pellet, *La Charte des Nations Unies* (2nd ed 1991) pp.1113-1127).

305. The Administering Authority was accountable to the United Nations from which its authority over the territory derived. Apart from obligations owed to other Member States (which are not in question here), the obligations of a trusteeship power were matters for review and judgment by the supervisory organs of the United Nations. Yet there were only recommendations and nothing more made in this regard in relation to the rehabilitation of the mined areas of Nauru (see paras.171 to 202 above). If Nauru is to allege a breach by Australia of some trusteeship obligation it at the same time effectively condemns the United Nations and the whole supervisory mechanisms used to review the performance of an Administering Authority.

Section II: The choice of means by the Administering Authority

306. Because the relevant trusteeship obligations are obligations of result, the choice of means necessary to meet those obligations remained with the Administering Authority. Various factors influenced the choice that was in fact made.

307. The phosphate mining itself which took place under a concession held by the British Phosphate Commissioners cannot be described as inconsistent with the Trusteeship Agreement, for it clearly was not. Nauru itself does not question the mining *per se*, for it alleges only a duty to rehabilitate. The question is whether, in order to comply with the trusteeship obligations, such mining had to be accompanied by rehabilitation.

308. Prior to 1964, as has been indicated (paras.121 to 141), resettlement was seen by the Nauruans, the United Nations and the Administering Authority as the most appropriate way in which to ensure the future well-being of the Nauruan people. All the efforts of the Administering Authority were concentrated on this.

309. Given that resettlement was the preferred solution, rehabilitation was until that time not an option that made any sense. To incur the cost of rehabilitation would have been to waste financial and other resources that would be needed for other purposes, including the establishment of a new homeland.

Rehabilitation was also regarded as of uncertain benefit given the lack of rainfall, the risk of any replacement soil being washed away and the prohibitive cost of transporting replacement soil to Nauru. These issues had been carefully examined in CSIRO and BPC studies between 1954 and 1965 and are referred to in greater detail in paragraphs 143 to 157 above. As the 1954 CSIRO report said, for instance, "no practical possibility whatsoever is seen of wide scale utilisation of worked out phosphate lands for agriculture" (Preliminary Objections, Vol.II, p.129).

310. The United Nations shared the scepticism as to the usefulness of rehabilitation. In the 1962 Visiting Mission report, for instance, it was concluded that "settlement... in a new home is unavoidable" (see paras.121 to 141 above for a detailed examination of United Nations consideration of this issue).

311. Up until 1964, when the option of resettlement was abandoned (although not entirely by the United Nations and the Partner Governments), there was a general acceptance that given likely population growth and the inability to make the phosphate lands productive, rehabilitation was not a viable option. It is impossible for Nauru to contend in these circumstances that rehabilitation was a necessary means to comply with the trusteeship obligations. The trusteeship obligations were being met and were expected to be met by a choice of means other than rehabilitation.

312. After 1964 the choice of means necessary to fulfil the trusteeship obligations was dictated by additional factors. The Nauruans decided to stay on the island. They also demanded independence no later than 1968. Clearly, it was not possible in that time for the Administering Authority to undertake rehabilitation. A further, comprehensive study of this issue was undertaken by the Davey Committee. It too concluded that comprehensive rehabilitation of all mined areas "while technically feasible" was "impracticable" given the very many practical considerations involved. An examination of the conclusions of the Committee has been provided in paragraphs 153 to 165 above.

313. While certain uses of mined-out land could be contemplated (such as an airstrip or water storage), the Committee emphasised the need for long-term land use planning. It also pointed to the fact that:

> "elsewhere in the world phosphate mining appears not to have been subject to the same kind of regulatory requirements for land

> restoration or rehabilitation as other kinds of mining operations. This is undoubtedly because the difficulties and costs involved make treatment of worked out phosphate lands generally uneconomic..." (p.27; reproduced in Vol.3, NM, p.237).

314. Hence, there is no basis for Nauru to say that rehabilitation was the normal way in which phosphate mines were treated. Rehabilitation, in the circumstances of Nauru, was only an issue that arose from the fact that the phosphate lands occupied a significant proportion of the land mass of Nauru and in circumstances where the option of resettlement was not taken up.

315. It should also be recognised that rehabilitation would not restore something that previously had been of great value. As the Davey report said:

> "The plateau area had in the past not been intensively used by the Nauruan people. The whole population formerly resided and still resides on the narrow strip of low coconut lands surrounding the island, comprising some 998 acres, and in the relatively fertile basin of about 154 acres surrounding the Buada Lagoon, a small lake at approximately sea level. The phosphate lands carried a vegetative cover ranging from sparsely growing and stunted trees to denser stands of tomano and wild almond with some coconut trees and pandanus in favoured areas. The main former use of the phosphate lands - as a source of timber for canoes and thatching materials for hut construction and as a reserve for the hunting of birds, the only form of wild life on the island - are scarcely relevant to the present economic circumstances and way of life of the Nauruan people. The limited food produced on the uncultivated uplands obviously never made a significant contribution to the subsistence of the Nauruans. The very porous, thinly soiled phosphate lands would undoubtedly have been the first and most seriously affected in the recurring drought periods, and in any event the output on the coastal fringe in favourable years would have been inadequate for consumption requirements. Today there is no sign that unmined land on the slopes of the plateau is being used for any form of productive activity except for a very small area which is under cultivation as a vegetable garden by Chinese members of the BPC work force...
>
> The concern of the Nauruans over the denuded condition of the phosphate-bearing lands after mining is not so much because of any

> loss of currently useful production there but because of loss of opportunities for future utilization of these areas for habitation, agriculture or other purposes. It was estimated that these reduced opportunities would become a more serious restraint upon the Nauruan economy as population density on the island increases substantially above present levels. Difficulties would also occur when and if reduced dependence upon imported foodstuffs became necessary or desirable" (p.9-10, Vol.3, NM, p.219).

316. Given the continuing uncertainty as to the economic feasibility of rehabilitation and the fact that the form of any rehabilitation would need to depend very much on the choice of the Nauruan people as to land use priorities, the Administering Authority took a proper decision. It decided that any obligations it had under the Trusteeship to promote the well-being of the Nauruans could be met by financial provision which would enable the Nauruans to carry out rehabilitation in the future if they so decided. The financial means provided were substantial and adequate for this purpose. They included the Trust Funds in existence at the time of independence. This included the Long Term Investment Fund designed specifically to provide for the economic future of the Nauruan people when the phosphates were exhausted, the value of which stood at over A$6 million on 30 June 1967 ($A42 million in 1993 values). In addition, the Partner Governments relinquished completely the interests of BPC in the phosphate deposits (a settlement worth $A90 million in 1967 or $630 million in 1993 values). A fuller analysis of this settlement indicating the benefits received by Nauru is contained in the Section VII of this Chapter.

317. The 1967 settlement was made after a careful re-examination of the whole question of rehabilitation. Once resettlement was abandoned, the Administering Authority in good faith further reviewed the feasibility of rehabilitation. The Davey Committee reported. It concluded that comprehensive rehabilitation in the sense sought by Nauru was not feasible. Is it suggested by Nauru that an obligation to rehabilitate existed whether or not it was feasible and in the interests of the inhabitants? Such an obligation would not appear consistent with the fundamental trusteeship principle to promote the well-being of the inhabitants. It would be expending money that could otherwise be spent on the welfare of the inhabitants on a futile exercise.

318. It was in these circumstances that the Partner Governments entered into the negotiations on the future of the phosphate industry. And it was with a view

to enabling Nauru itself to determine what course of action to take in relation to rehabilitation that the comprehensive settlement was agreed to by the Partner Governments. If Nauru was to achieve the independence which it wanted by 1968 there was clearly no opportunity to undertake further studies into whether rehabilitation was the best way in which to promote and protect the long term interests and well-being of the Nauruan people. The Partner Governments did not deny their responsibility to ensure the well being of the Nauruan people. They were clearly mindful of it and at independence left them very well provided. And as the Nauru Commission of Inquiry report indicates, Nauru itself has done little to pursue rehabilitation. As that report further indicates, rehabilitation is not a question simply of restoring land, but of Nauru deciding as a people on the particular form of land use that it is desired to achieve through rehabilitation. The Davey report had also recognised this.

Section III: Absence of any specific provision to rehabilitate in the Trusteeship Agreement

319. The Nauruan allegations concerning rehabilitation, if the Court considers it open to examine them in substance, cannot rely on any specific provision concerning rehabilitation in the Trusteeship Agreement or Chapter XII of the Charter. This is significant given that Nauru considers these instruments provide "the primary causes of action on which Nauru relies" (NM, para.243). Nauru is forced to contend that an obligation to rehabilitate arises out of the *existence* of the trusteeship "in the particular circumstances of Nauru" (NM, para.290). Regard, says Nauru, must be had to:

> "the basic purposes of the trusteeship system. That system would lack substance altogether if its principles were not inimical to the physical destruction of the homeland of the people of a trust territory" (para.294).

320. Australia does not deny that it had duties of a general kind arising from Article 76 of the Charter. But, as the Nauruan Memorial demonstrates, while it is easy to make general assertions based on such broad undertakings, it is more difficult to point to the legal and factual basis upon which any requirement to rehabilitate could be made out in this case. For, as Nauru recognises, only one-third of the phosphate lands were mined during the trusteeship. The mining of that area clearly did not make the island uninhabitable and the mining was carried out *with* the consent of the Nauruans and to their benefit. Nauru itself has chosen to mine the remaining two-thirds of the phosphate lands and yet has

not found it necessary to undertake any rehabilitation itself in order to ensure the island remains inhabitable. Nauru has continued to prosper as an independent State with a high rate of population increase. This indicates that Nauru is not really serious about rehabilitation, but is seeking some financial gain at Australia's expense.

321. As Judge Shahabuddeen has recognised, "part of the problem concerns the correct appreciation of Nauru's case" (*ICJ Reports 1992*, p.282). And Nauru itself does not assist. Judge Shahabuddeen outlines what he understands to be the essence of the Nauruan case. This is that Australia:

> "failed to exercise these comprehensive governmental powers so as to regulate the phosphate industry in such a way as to secure the interests of the people of Nauru... [T]here was a failure to institute the necessary regulatory measures to ensure the rehabilitation of worked-out areas, not in the case of mining in any country, but in the case of large-scale open-cast mining in the miniscule area of this particular Trust Territory. The consequence, according to Nauru, was that the Territory became, or was in danger of becoming, incapable of serving as the national home of the people of Nauru, contrary to the fundamental objectives of the Trusteeship Agreement and of the Charter of the United Nations" (p.282).

322. If this is the real Nauruan claim it follows from this formulation of the claim that the only provision of Article 76 of the Charter that is relevant is Article 76(b). This provides that one of the basic objectives of the trusteeship system is:

> "to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement."

323. It is not apparent how a requirement to rehabilitate can arise from such a broad objective. Nor can one read into such an obligation of result any requirement to pursue particular actions such as rehabilitation. There are no other provisions of the Charter which appear to be relevant.

324. The 1947 Trusteeship Agreement itself (Annex 29, Vol.4, NM) was approved by General Assembly resolution 180(II) on 1 November 1947. Again, it contains no specific duty to rehabilitate mined-out areas. Article 3 provides that the Administering Authority will administer the Territory in such a manner as to achieve the basic objectives of the Trusteeship system set forth in Article 76 of the Charter. Article 5(2)(a) requires the Administering Authority to respect the rights and safeguard the interests of the indigenous inhabitants. Article 5(2)(b) provides that, in discharge of its obligations under Article 3, it will "promote, as may be appropriate to the circumstances of the Territory, the economic, social, educational and cultural advancement of the inhabitants". It is difficult to see how these provisions in the Trusteeship Agreement create a requirement to rehabilitate.

325. The Nauruan Memorial is marked by a distinct lack of any consideration of how the actual trusteeship provisions can support a claim for rehabilitation. Nauru contents itself with broad assertions such as that the Trusteeship Agreement and Article 76 of the Charter are clearly standard-setting in character and involve the application of the standards and obligations of general international law in a particular territory (NM, para.247). The position under general international law is dealt with below (Chapter 3). Nauru also seeks to derive general comfort from the trusteeship obligations on the ground that they embrace some "broad concept of trusteeship reflecting the general institutions of guardianship and curatorship" (NM, para.263) and that this in some way supports the rehabilitation claim. Australia rejects this argument in paragraphs 292 to 305 above. It highlights, however, the complete lack of specificity in the Nauruan claim that rehabilitation arises from the trusteeship obligations. The actual conduct said to constitute breach of these vague obligations is examined below (Part II, Chapters 3 and 4).

Section IV: Absence of any allegation of breach prior to termination

326. The allegation that Australia in some way has breached an obligation to rehabilitate arising from the Trusteeship Agreement is novel and is not one that was made by Nauru or the United Nations prior to termination of the Trusteeship. On the contrary, Head Chief DeRoburt made a formal acknowledgment before the Trusteeship Council that rehabilitation was not an issue relevant to the termination of the Trusteeship Agreement or a matter for United Nations discussion (see para.207 above).

327. While the Court has concluded that at the time of independence the question of rehabilitation of the phosphate lands had not been settled (*ICJ Reports 1992*, 254, para.33), that in no way is the same as a finding that Nauru had alleged prior to independence that the failure to rehabilitate constituted a breach of the trusteeship. And as any examination of statements by Nauru on this issue prior to independence shows, there was no allegation of breach of trusteeship. A legal basis for the alleged claim was not stated. It was presented by Nauru as no more than a moral claim and that is how Australia understood it until these proceedings. Nauru itself has recognised that even now its claim is based on what it considers fair and equitable (CR 91/18, p.28).

328. The two United Nations resolutions that called for rehabilitation (resolutions 2111(XXI) and 2226(XXI)) contained no suggestion of breach of the Trusteeship Agreement (paras.176 to 183 above). They simply recommended certain action by the Administering Authority in the same way as recommendations were made to other administering authorities on a whole range of trusteeship issues by both the General Assembly but also more particularly the Trusteeship Council.

329. It is only following the Commission of Inquiry report in 1988 that Nauru started to claim that Australia had breached its trusteeship obligations by failing to carry out a rehabilitation program. Until then, there was never any statement to indicate that Nauru considered its demands on the Partner Governments as anything other than a moral claim. Yet if Australia and the other Partner Governments were in breach of trusteeship obligations by failing to rehabilitate, Nauru would have said so from the beginning when the claim was first made and particularly in United Nations forums. Yet it did not. One can only conclude that Nauru until recently never considered that there had in fact been any breach of trusteeship obligations.

Section V: Relevance and effect of General Assembly recommendations

330. The significance of the fact that certain General Assembly resolutions referred to rehabilitation falls to be determined in light of the obligations of the Administering Authority. The fact that a resolution calls for particular action cannot in itself be taken as indicating that failure to comply amounts to a breach of Trusteeship obligations. As noted above, these were obligations of result. There were many United Nations resolutions relating to particular Trusteeships. Such resolutions were no more than recommendatory, so that failure to adopt the recommended course did not amount to breach of any international obligations.

The important thing was to effect the required result. The only obligation owed by the Administering Authority in respect of these resolutions was to consider them in good faith.

331. As Judge Lauterpacht said in the 1955 *Advisory Opinion on South West Africa (ICJ Reports 1955*, p.66 at p.116):

> "The Trusteeship Agreements do not provide for a legal obligation of the Administering Authority to comply with the decisions of the organs of the United Nations in the matter of trusteeship. Thus there is no legal obligation, on the part of the Administering Authority, to give effect to a recommendation of the General Assembly to adopt or depart from a particular course of legislation or any particular administrative measure. The legal obligation resting on the Administering Authority is to administer the Trust Territory in accordance with the principles of the Charter and the provisions of the Trusteeship Agreement, but not necessarily in accordance with any specific recommendation of the General Assembly or of the Trusteeship Council."

332. Judge Lauterpacht examined the practice of States administering Trust Territories to demonstrate that such States have asserted their right not to accept recommendations of the Trusteeship Council and the General Assembly, and that this right "has never been seriously challenged" (at 116). Nauru is one example, quoted by Judge Lauterpacht:

> "When the Trusteeship Council recommended in respect of Nauru that the long term royalty investment funds should not necessarily be limited to Australian Government securities, but should be invested freely in the best interest of the Nauruans, the Administering Authority explained why it was unable to act upon the recommendation (A/933, *Official Records, Fourth Session, Suppl. No.4, p.77; A/1306, Fifth Session*, Suppl. No.4, p.134)" (*ICJ Reports 1955* at 117.)

333. Australia was required to take account of the resolutions on rehabilitation (which it did), but it was under no obligation to give effect to the recommendations on rehabilitation contained in them. In fact, Australia gave serious consideration to the various recommendations of the Trusteeship Council and those of the General Assembly and explained its reasons for not

acting on the recommendations (see Judge Lauterpacht in the 1955 advisory opinion, *ICJ Reports 1955* at p.119-120). These reasons have been outlined in some detail above (see especially paras.171 and 188). (As Chapter 4 below shows there can therefore be no separate allegation that Australia has failed to comply with some independent duty in relation to its accountability to the United Nations.) The United Nations itself made no finding that Australia abused any duty in this regard. As Part I has shown, there were sound reasons for Australia choosing not to set about rehabilitating Nauru's worked-out phosphate lands before independence. There was no technical solution that could have been implemented in a way that was economically sensible. It was also recognised at the time that any rehabilitation would need to be the result of a land use plan covering the whole island and not just that area already mined. In these circumstances, the Administering Authority chose alternative means to rehabilitation. One cannot, therefore, derive a breach of trust obligations from the fact that recommendations on rehabilitation were made by the General Assembly.

334. As well as the General Assembly, the Visiting Missions and the Trusteeship Council throughout the period regularly discussed the issue of rehabilitation (see paras.171 and following) and this is reflected in their reports. Not once is any finding made in those reports, nor do they contain any serious suggestion, that failure by the Administering Authority to rehabilitate would amount to a breach of trusteeship obligations.

Section VI: The unconditional termination of the Trusteeship precludes any complaint of breach of the Trusteeship Agreement

335. In its judgment of June 1992, the Court held that, having regard to the particular circumstances, "the rights Nauru might have had in connection with rehabilitation of the lands remain[ed] unaffected by the termination of the Trusteeship by the General Assembly" (*ICJ Reports 1992*, p.253, para.30). Australia no longer contends that the Court does not have jurisdiction to hear the Nauruan claim. Nor does Australia contend any longer that Nauru's claim for rehabilitation is inadmissible in its entirety.

336. In the same judgment, the Court also held that General Assembly resolution 2347(XXII) of 19 December 1967 had "definitive legal effect" and that the Trusteeship Agreement was terminated on that date (p.251, para.23). Clearly enough, this changed the status of the Territory. It also meant that, since that date, there has been no basis on which to challenge an alleged failure by the

Administering Authority to comply with its obligations with respect to the administration of the Territory. This is because the termination of a Trusteeship Agreement is the ultimate act of supervision by the United Nations. It signifies either that the Administering Authority has committed so serious a breach that it is disqualified from acting further in that behalf, or that the Administering Authority has fulfilled its obligations so well that there is nothing left for it to do other than respect the people's exercise of their right to self-determination.

337. In Nauru's case, there is no doubt that the General Assembly terminated the Trusteeship on the ground that the Administering Authority had discharged its task so well that there was nothing further for it to do, save abide by the Nauruans' act of self-determination. In so doing, it made a conclusive pronouncement on the conduct of an Administering Authority with respect to its trusteeship obligations. There can be no question of the United Nations' competence in this regard. In the *Namibia* case, the Court said:

> "the United Nations... acting through its competent organs, must be seen above all as the supervisory institution, competent to pronounce, in that capacity, on the conduct of the mandatory with respect to its international obligations, and competent to act accordingly." (*ICJ Reports 1971*, at pp.49-50.)

338. There is no difference in this respect between the United Nations as a successor body to the League of Nations in relation to a Mandate and its position when exercising an ultimate supervisory authority with respect to a trusteeship regime under its powers derived from Articles 16 and 85 of the Charter.

339. Thus, when the United Nations decided that, because the Administering Authority had completed its task, the Nauruan Trusteeship should be brought to an end, it disposed of all the legal issues concerning the administration of the Trusteeship by the Administering Authority - "at least, those relating to the basic trusteeship obligations as distinct from individual rights of United Nations members, such as for example to equality of treatment" (J Crawford, *The Creation of States in International Law* (1979) p.342).

340. As a result, Nauru cannot successfully argue that, by failing to exercise its governmental powers so as to provide for a rehabilitation scheme on Nauru, Australia breached obligations arising under the Trusteeship Agreement with respect to the administration of the Trusteeship. It apparently seeks to make

these arguments (CR91/20, p.83; CR91/22, p.45), but they are foreclosed by the prior pronouncement of the United Nations, acting through the General Assembly. To succeed, therefore, Nauru must show that its rehabilitation claim arises from general international law and not from obligations under the Trusteeship Agreement with respect to trusteeship administration. It must be these general international law rights, if any, which the Court holds unaffected by the General Assembly's decision to terminate the Trusteeship. (The status of Nauru's claim at general international law is dealt with in Chapter 3.)

341. It will be recalled that the General Assembly well knew that Nauru and the Administering Authority differed on the question of responsibility for rehabilitation (*ICJ Reports 1992*, p.253, para.30). The position may have been different had the Assembly, in terminating the Trusteeship, also reserved the question of rehabilitation, or imposed a condition concerning the performance of any related and outstanding obligation. It did not. The unqualified terms of resolution 2347(XXII), making no reference to rehabilitation whatsoever, are consistent only with the Assembly's pronouncement that all the obligations of the Administering Authority with respect to the administration of the Trusteeship had been met. In this situation, termination must be taken as determinative and a *finis litium* to any assertion of failure to comply with the obligations concerning the Territory's administration. The resulting situation is explained by one writer in the following terms:

> "the answer would seem to be that the Assembly's function here is a determinative one - that it is designated by the Charter to decide particular matters of political fact, applying principles of self-determination implicit in the Trusteeship instruments. It is obviously necessary, as Judge Wellington Koo pointed out, that in these matters there be some *finis litium*" (J Crawford, *The Creation of States in International Law* (1979) pp.343-4).

342. This analysis carries with it the consequence that upon termination of the Nauruan Trusteeship, there was no longer any basis on which to question the performance of obligations concerning Australia's administration under the Trusteeship Agreement. Moreover, the unconditional termination is compelling evidence that the United Nations considered that there had been no breach of the Trusteeship Agreement, though the Administering Authority had declined to accept the responsibility for rehabilitation which Nauru sought to thrust upon it.

343. Of course, as noted above, there remains the question whether, at general international law, Nauru had any other entitlement. See Chapter 3 below. But if the responsibilities of supervision exercised by the United Nations bodies are not to be ignored, it must unquestionably be recognised that termination unconditionally of the Trusteeship now precludes any second-guessing, or re-examination, of the action of the United Nations General Assembly with a view to finding some breach of trusteeship obligations never previously identified.

Section VII: The benefits from phosphate mining

A. INTRODUCTION

344. Even if one takes a broad view of the trusteeship obligations which Nauru asserts support a requirement to rehabilitate, Nauru must still demonstrate that there was a breach of those obligations. In considering whether there is any factual basis for the Nauruan allegation of breach, the benefits received by Nauru from phosphate mining and particularly the 1967 phosphate agreement must be examined. This shows there is no basis for the Nauruan claim.

345. Phosphate mining on Nauru transformed the island from an isolated subsistence community to one whose inhabitants had adequate financial and other resources to become and remain a modern independent State. It remained a community where the return from phosphate meant that, after 1951, direct taxes on the Nauruan people were unnecessary (see para.84 above). This Chapter examines the benefits from the phosphate industry received by Nauru prior to independence and as part of the independence settlement. It also examines the economic and financial consequences of phosphate mining.

346. That the phosphate operations brought the island prosperity is evident from comments by United Nations Visiting Missions. The 1965 Visiting Mission said for instance:

> "Thanks to the phosphate, this tiny island lost in mid-ocean has houses, schools and hospitals which could be the envy of places with a very ancient civilization. Its citizens pay no taxes. Because of these favourable conditions and the spirit of mutual assistance characteristic of the inhabitants, poverty is virtually unknown in Nauru. There is a high standard of living: necessities and even many luxuries are imported. The stores and shops are well stocked with goods. Few people walk in this Territory, which has an area of 8 1/4 square miles

> and a circumference of 12 miles: there are over 1,000 motor vehicles (not to mention bicycles) for a total population of 4,914, including 2,661 Nauruans (at 30 June 1964)" (para.2, Annex 12, Vol.4, NM).

347. This was not a new phenomenon. Earlier Visiting Missions expressed similar views:

> "That the Nauruans have derived considerable benefit from the industry is at once obvious to anyone visiting the Territory. On the whole, the Mission found the Nauruans better clothed, in better health, better nourished and better educated than is usual at this time in Pacific Island territories." (para.42, 1953 Visiting Mission report, Annex 7, Vol.4, NM.)
>
> and
>
> "the mining of phosphate has brought to the Nauruans greater prosperity and better social services than are enjoyed by any other community of similar size in the Pacific region" (para.18, 1956 Visiting Mission report, Annex 9, Vol.4, NM).

Throughout the period of the Mandate and Trusteeship, the provision of administration expenses from the proceeds of the phosphate operations led to a community that was well provided for in terms of health, education and welfare and that paid virtually no taxes. The absence of taxes is particularly pertinent having regard to Nauru's allegations concerning the absence of adequate public funding by the Administering Authority.

348. In this the role of the BPC was important.

> "The role of the British Phosphate Commissioners in the Territory was related primarily to the phosphate enterprise, which was the sole reason for the presence of their Nauru management. The direct effects of the enterprise on the Nauruan community were, first, financial benefits through royalties, surface rights payments, free social services and free or subsidised public utilities; and second, opportunities for employment of Nauruans within the Commissioners' Nauru management. Incidental benefits included the frequent diversion of the management's resources to public works and housing projects for the Nauruan community, and a share in the use of various facilities, such as a cheap shipping service for which they were reimbursed by the

> Administration or the Nauru Local Government Council as the case might be.
>
> Although the Commissioners provided nearly all the funds for the Administration budget, they had no powers in determining its content. They may have been invited to give advice on some item." (Report on the Administration of Nauru, 1966-68, p.17)

349. Nauru complains that the revenue derived by the BPC from phosphate mining was neither taxed, nor treated as public revenue (NM, para.336). But this was more than offset by the fact that the phosphate income of the BPC paid entirely for a very high standard of administration, whilst the Nauruans paid no tax at all (see Part I, Chapter 3).

350. While the Nauruans were well provided for as a result of the phosphate operations, there was also a large expatriate community principally to provide labour to work in the phosphate operations. The pattern emerged from early days whereby the Nauruans, who received direct income and other benefits from those operations, did not find it necessary to seek employment in the phosphate industry. Non-Nauruans made up around half of the island population during most of the period under Mandate and Trusteeship.[8]

B: ROYALTIES AND TRUST FUNDS

351. Throughout the Trusteeship, royalties were paid to a number of trust funds. The details of these have been set out above (para.89). In response to changing needs and expectations, the amount paid in royalties gradually increased, and rose significantly in the years prior to independence (see paras.92 to 105). As at 30 June 1967 the amounts standing to the credit of the two principal trust funds were substantial. They were as follows:

Nauru Landowners Royalty Trust Fund	$A3,022,607.00
	(in 1993 values $A21 million)
Nauru Long Term Investment Fund	$A6,241,719.49
	(in 1993 values $A43.4 million)

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[8] Population figures appear in the reports of the Administering Authority to the United Nations. See also Table II to the 1965 Report of the Visiting Mission to Nauru, Annex 12, Vol.4, Nauruan Memorial.

There was also a sum in the Royalty Trust Fund of $A307,774 ($A2.1 million in 1993 values) and payments continued to be made to individual landowners (see para.89 above). There was, therefore, almost $A10 million ($A70 million in 1993 values) in trust funds.

352. The Partner Governments, in the years after resettlement was abandoned, ensured that significant amounts were paid to the Long Term Fund. It was intended that that Fund would be available when the phosphate ran out, to be spent on projects of benefit to the Nauruan people, including possible rehabilitation projects if they so chose. Accumulating the funds available at independence by reference to the short term government bond rate yields an estimate by 1995 of some $A136 million (see CIE study, Preliminary Objections Vol.II, p.186). The Trust Funds were passed to Nauruan control on independence for this reason. To effect this, Ordinances were made just prior to independence to put Nauruan administration concerning the phosphate royalties on a satisfactory basis. The *Nauru Phosphate Royalties Trust Ordinance* 1968 and the *Nauru Phosphate Royalties (Payment and Investment) Ordinance* 1968 were among the Ordinances enacted in the few days prior to independence. These Ordinances appear as Annexes 10 and 11 to the Preliminary Objections. These Ordinances were designed to reflect the new arrangements for the payment of royalties after 1 July 1967 as a result of the 1967 Agreement.

353. At the same time, the phosphate agreement was given legislative effect in the *Nauru Phosphate Agreement Ordinance* 1968. The Trust Ordinance formally established the Long Term Investment Fund and the Landowners Royalty Trust Fund, subject to the control of the Royalties Trust, in place of their existence as trust funds under the control of the Administrator. The Royalties Trust set up by the first Ordinance was created as a separate legal person with responsibility to administer the trust funds which it has continued to do until the present (see its 1988-89 Report, Annex 29 to Preliminary Objections).

354. In the other Ordinance, the Royalties Ordinance, detailed provision was made for a number of different trust funds, including a Development Fund, Housing Fund and Rehabilitation Fund. The amounts payable to the various funds set out in the Ordinance reflected the wishes of the Head Chief and Chairman of the Nauru Local Government Council. Establishment of these additional Funds reflected the priorities of the new Nauruan Government. Hence, while a separate Rehabilitation Fund was now established and a separate allocation made to it, this was the result of a decision by the Nauruan

Government to identify this issue as one which would require special provision. In the same way a separate Development Fund was created. So far as the Partner Governments were concerned, the Long Term Investment Fund had been established to meet the needs, however identified, of the Nauruan community when the phosphate was exhausted, and this could include expenditure on rehabilitation if that was what the Nauruans wanted. It was a fund available for rehabilitation or for other future needs, depending on what Nauru chose to do with it.

355. The existence of these Funds, with their existing balances and prospects of continuing payments into them, ensured that after independence the Nauruan people would be in a position to make their own decisions as to how to develop their country, and that they would have the financial means with which to undertake whatever reasonable development decisions they made.

C: THE VALUE OF THE PHOSPHATE SETTLEMENT

356. An assessment of the benefits received by Nauru must include an examination of the benefits received as a result of the Phosphate Agreement of 1967. To understand the significance of this agreement it is necessary to understand fully the course of the negotiations leading to its conclusion. This has been recounted in outline in Chapter 5 of Part I above. This section will refer to certain elements in those negotiations in more detail.

357. The settlement involved, in particular:

(a) the purchase of the BPC assets by Nauru at a favourable price; and

(b) the relinquishment of any continuing BPC interest in the phosphate - there was to be no further share in the profits nor any management role for the BPC once the assets were purchased.

358. This outcome represented a significant concession from what the Partner Governments considered to be their reasonable entitlements. These concessions were made on the basis that Nauru would assume all responsibilities for the island's future including responsibility for any future rehabilitation if that was considered appropriate. The Court has found that Nauru did not waive its claim with respect to rehabilitation. But the 1967 Agreement and the negotiations preceding it show very clearly that Nauru has acted quite unreasonably in seeking to pursue it. It was clearly only one element in the negotiations. Each side made a number of concessions and it was certainly seen by both sides at the

time as just one element in the Nauruan negotiating position. An examination of the negotiations confirms this.

359. The circumstances in which Nauru agreed to purchase the assets have been outlined in paras.229 to 233 above. The final price agreed to be paid for the assets was $21 million. A paper prepared at the time by the Department of Territories, based on BPC information, sets out some figures which show that the price was fixed on a basis entirely favourable to Nauru, ie at "original cost less depreciation at a rate consistent with the economic life of the asset" (cl.8(1) Canberra Agreement). The paper is Annex 2 to this Counter-Memorial. It shows at 30 June 1966 assets at cost of $25 million, a book value of $15 million and approximate replacement value of $44 million. The paper indicates, however, that if the BPC negotiated with an incoming operator "on a commercial basis it would regard $30,000,000 to $32,000,000 as a minimum value for the assets represented above, on the basis of a takeover as a going concern". See also Record of Negotiations, 21 April 1967, Vol.3, NM,p.493. The Partner Governments did not sell the assets as if there was a normal commercial transaction. The price was part of the overall package of benefits being provided to Nauru.

360. A review of the negotiations shows that it had been the expectation of the Partner Governments that they would continue to receive some share of the proceeds from the phosphate, whether in the form of a share of profits or in the form of a management fee. And this was not unreasonable given that the BPC had concession rights over the phosphate to the year 2000. In 1966 Nauru had accepted that the BPC should be the managing agents of the phosphate operation, for which BPC would receive a fee. But Nauru changed its position the following year and said instead that a Nauruan Phosphate Corporation should operate the entire industry.

361. The position reached at the start of the 1967 negotiations is set out in Appendix II to the records of the meeting of 12 April 1967 (Vol.3, NM,p.518-9). The new Nauruan position was outlined in their opening statement at the 1967 talks (Nauruan Delegation 67/1, Vol.3, NM, p.559 ff). Important passages are as follows:

> "Given the urgent need for funds to rehabilitate Nauru and to provide for the Nauruan community when the phosphate is exhausted it is vital that the Nauruan people receive the maximum possible financial return on their phosphate. At the time when the Council prepared its

Opening Statement at the June talks, it made provision for the payment of a management fee to the British Phosphate Commissioners operating the phosphate industry as managing agents for the Nauruan people. However the representatives of the Partner Governments have since refused to meet any costs of rehabilitating Nauru (except what could be squeezed out of future earnings of the phosphate industry). In these circumstances the Council has had to reconsider its whole position. In doing so we have come to the conclusion that if we are to maximize the economic returns to the Nauruan people (while meeting the essential interests of the Partner Governments) we cannot afford to pay a management fee to the British Phosphate Commissioners, or indeed to any other mining operator. In meeting the interests of the Partner Governments by entering into an agreement on supplies and on price the Nauruan people are accepting all the normal business risks and it would be quite inappropriate for the Partner Governments to expect a commercial profit over and above the agreement on supplies and price.

The hard fact of the matter is that the Nauruan people must obtain the maximum amount of money from the phosphate. The Partner Governments will be aware that if the Nauruan people have to meet the entire cost of rehabilitation there will be very little money available in the form of a capital sum for when the phosphate is exhausted. Even if the Nauruan people were to receive immediately the whole of the difference between the fob ($12.00) and the sum of costs of production ($3.74), costs of administration ($1.20) and managerial fee of 10% on costs ($0.37) they would, over the life of the phosphate, receive $312 million or only some $70 million after rehabilitation costs are met. Under a managerial fee arrangement the BPC would receive $22 million after all costs had been met (excluding the $140 million they have received since 1949 in the form of lower prices passed on to consumers of superphosphate) whereas the Nauru people would receive only $70 million and an island restored to something approximating its original condition. This $70 million is quite insufficient to provide for the future after the phosphate is exhausted and the Nauruan people therefore need the $22 million that would otherwise go to the BPC." (at pp.562-563)

362. Nauru itself in this statement linked both rehabilitation and future control of the phosphate industry. And this reflects the fact that the negotiations between the Partner Governments and the Nauruans demonstrate that the matters of the phosphate industry and rehabilitation were discussed and dealt with together, as part of an overall settlement. When the Partner Governments gave up their claim for a share of the phosphate revenue, they did so on the understanding that Nauru would assume full responsibility over all matters connected with the phosphate industry. This is evident from a perusal of the records of the 1967 meetings (see, for instance, 20 April 1967, Vol.3, NM, pp.495-6). In particular, the Partner Governments considered the financial arrangements involving the phosphate industry as relevant to the rehabilitation claim. They said:

> "[T]he decision to abandon the resettlement proposals was a decision by the Nauruans, not one that was forced upon them, and that in so deciding they were rejecting proposals which were sound and practicable. That decision was taken by the Nauruans, and it was the view of the Partner Governments that decisions regarding rehabilitation were also matters for the Nauruans and that the Partner Governments' proposals in respect of financial arrangements provided adequate means to carry out whatever redevelopment of the mined areas might prove to be necessary." (Vol.3, NM,pp.495-96.)

363. Despite this, the Joint Delegation proposed that without prejudice to their respective positions the two delegations might look at the needs for rehabilitation which Nauru said required a substantial sum. The Nauruans, however, refused to discuss particular rehabilitation needs and stuck with their general position that "our interests are best served by maintaining the general position that the future of the Nauruan people depends on getting as much as possible from the remaining phosphate on the island" (see Nauruan Delegation 67/5, Vol.3, NM, p.497). On 10 May 1967 when talks returned to this issue after a break, the Partner Governments restated their position (Joint Delegation 67/2, Vol.3, NM, pp.573-75). This included the statement: "The partner governments consider that the proposed financial arrangements on phosphate cover the future needs of the Nauruan community including rehabilitation or resettlement". It is again clear that the financial arrangements and rehabilitation continued to be linked. Nauru responded in a statement (Nauruan delegation 67/6, Vol.3, NM, p.549). This included the statement: "we have been placed in a position where

our basic needs for survival can only be met by receiving the full financial return from the operation of the industry".

364. The Nauruans sought a position of maximum global benefit. They did not ask for any separate allocation of funds, any special "earmarking" of funds for rehabilitation. Given that they had not developed a rehabilitation plan, that decision is understandable: for identifiable, specific projects would have been scrutinised by the Partner Governments to see whether they would be likely to cost the specific sum sought by the Nauruans. So, in truth, neither side contemplated an earmarked sum. It is surprising to find that, today, the core of Nauru's complaint is that no specific sum was earmarked.

365. On 16 May a further discussion took place on the phosphate arrangements. The Partner Governments also continued to argue that some sharing arrangement was appropriate having regard to the 1966 Working Group Report (Vol.3, NM, pp.468-9). The Working Party Report produced following the 1966 round of negotiations between the Partner Governments and Nauru is set out as Annex 7 to the Preliminary Objections. The 1966 Report considered financial arrangements in force in various parts of the world for sharing the benefit of phosphate mining operations. It pointed to two different approaches: share of profits between operating companies and governments and the return of profit on shareholders' funds. The Australian representatives considered that the available material suggested a 50:50 sharing between Government as the owner and the commercial enterprise as operator was a not unreasonable general principle to be drawn from the material (para.12 of the Report).

366. At the 16 May discussions, the Secretary, speaking for the Partner Governments said:

> "The Joint Delegation thought that there was scope for reaching a sharing agreement in financial arrangements. The Nauruan Delegation now claimed that the full proceeds of phosphate were needed due to rehabilitation, otherwise the Delegation seemed to accept that a sharing arrangement would be the normal practice." (Vol.3, NM, p.469)

367. The Head Chief said that "went a long way towards describing the Nauruan position but not entirely" (see Vol.3, NM, p.469). After commenting on the valuation of assets a further set of figures on sharing was put forward by the

Partner Governments (Joint Delegation 67/3, Vol.3, NM, p.572). This proposed a 75% to 25% split between Nauru and Partner Governments.

368. On 17 May 1967, in response to continued Nauruan insistence on Nauruan management, the Partner Governments made a further proposal whereby the sharing arrangement would be replaced by a system involving a lower price for the phosphate while BPC continued as agents of a Nauru Phosphate Corporation. The proposal was part of a package which it was made clear comprised: "a price of 110 shillings with the entire proceeds going to the Nauruans ... capital assets value of $30 million paid for over an agreed period at 6%: management arrangements [involving management by BPC subject to a Nauru Phosphate Corporation (as set out in Joint Delegation 67/4, Vol.3, NM, p.569)], an understanding on rehabilitation under which Nauru would not continue to press this subject and linked with rights of immigration into Australia and New Zealand" (see SR.15, Vol.3, NM, pp.459-460).

369. The Nauruan response took the form of a lengthy statement (Nauruan Delegation 67/8, Vol.3, NM, p.523ff) which rejected the Partner Governments' position on phosphate rights and rehabilitation and suggested a lower purchase price for the assets. The Nauruans argued that it was only fair that they receive all the future economic benefit from the phosphate if they were to be responsible for all rehabilitation, particularly in the light of figures which they said showed the Partner Governments had received a significantly greater return in the past than that which was fair (see para.26-29 of ND 67/8). (See also SR.16, 18 May 1967, Vol.3, NM, pp.453-5.) There was no suggestion here that Nauru would assume only limited responsibility for any rehabilitation.

370. On 19 May further Nauruan proposals were made (ND 67/9, Vol.3, NM, pp.521-2) which sought management by the BPC limited to two years. They also rejected the link between rehabilitation and immigration that the Partner Governments had made (Vol.3, NM, p.447). The Partner Governments accepted the Nauruan proposals on assets (about $20 million). They continued, however, to have problems with the Nauruan management proposals (SR.18). On 20 May the final Nauruan proposal for three years' management by BPC was made and it was agreed this would be referred to the Partner Governments. When negotiations resumed on 13 June the Partner Governments had accepted the basic proposals including the purchase period proposed in May by Nauru and attention turned to points of detail about when title to the assets would pass. This

then led to the Heads of Agreement being signed on 15 June 1967 (Vol.3, NM, p.410ff).

371. The final settlement clearly was a package arrangement. This much is apparent from the course of the negotiations. There were, it is true, some areas where the two sides remained in disagreement. These included rehabilitation where Nauru would not give any explicit release to the Partner Governments, and phosphate rights where Nauru refused to recognise explicitly that any such rights were held by the Partner Governments. The Partner Governments while not relinquishing their clearly stated position were prepared in good faith to conclude an agreement which would provide Nauru with the full economic benefit of the phosphate industry. The Partner Governments gave up a share of the profits (or management fee) which would have continued until the year 2000 (when BPC's rights under the concession ended). Based on figures provided by Nauru, this would have amounted to at least $A60 million (para.20 of ND 67/8; see Vol.3, NM, p.530). An estimate of the discounted cash flow estimates of profits lost by BPC by relinquishment is $A90 million (or in today's values $A630 million) if one values the phosphate as a going concern which Nauru had to acquire on commercial terms (see Annex 1). And this is not an unreasonable assumption. Nauru had no right at international law to acquire the whole phosphate industry for nothing. It was accepted at the time that acquired rights did not simply disappear with the independence of a new nation: D P O'Connell, *State Succession in Municipal and International Law* (1967) Vol.1, Ch.13; J H W Verzijl, *International Law in Historical Perspective* (1974) Vol.VII, p.196-202. Capital assets were also sold for $A21 million instead of their market value of approximately $A30 million.

372. In other words, an examination of the financial aspects of the settlement shows that the Partner Governments gave up over $A100 million ($A700 million today) which would have been theirs in any purely commercial transaction. It is simply not true to say that Australia along with the other two Governments did not make particular and sufficient provision for Nauru's future when the 1967 Agreement was concluded.

373. Nauru at the time used figures of $A90 million as the cost of the rehabilitation to be met by Partner Governments. This was one third of a total cost of $A240 million, which was the notional figure calculated by the Davey Committee as the cost of resoiling to a depth of 4 foot of 3500 acres (ie the whole of the phosphate lands). But this sort of rehabilitation was found by the

Davey Committee to be impracticable. It recommended works amounting to $A31 million. And this was in relation to the *whole* island, and not just the area mined by the BPC. On this basis it is quite apparent why the Partner Governments considered the financial settlement as a whole was more than adequate to compensate the Nauruans for their assumption of responsibility for rehabilitation of the whole island.

374. Nauru in 1967, and in its Memorial again, has argued that the fact that Australia and the other Partner Governments had received phosphate at low royalty rates is in some way relevant to the fairness of the phosphate settlement and in particular responsibility for rehabilitation (see Nauruan comments in 1967 where an estimate is made for lost income of $160 million (ND 67/8, para.20, Vol.3, NM, p.530), and more recently Appendix 2 to the Memorial (Vol.I, NM, p.306), where an estimate of 91 million pounds is made for lost income).

375. But this is not relevant. First, the Nauruan claim before this Court is a claim that there was an obligation to rehabilitate, not a claim to recover the difference between actual and optimal royalty rates. Secondly, in any event, it is clearly impermissible to apply standards of "fair return" that may have been applicable in 1967 and to suggest that they can be applied retrospectively to 1920. See Part II, Chapter 1, Section 3 above. Yet this is what Nauru seeks to do. (The legal irrelevancy of the claim in this respect is dealt with in Part II, Chapter 3 below.) For present purposes, it must be stressed that these figures are irrelevant to any assessment of the fairness of the phosphate settlement in relation to the issue of rehabilitation.

D: FINANCIAL SITUATION AT TIME OF INDEPENDENCE

376. Australia considered that at independence the Partner Governments had given Nauru adequate financial resources to provide a secure future for the island. It took the view that it was for Nauru to decide how it wished to spend the then accumulated royalty funds and the income from the phosphate operations, of which they would receive the full benefit. After the BPC assets on Nauru had been purchased, the BPC had no remaining interest in the Nauruan phosphate.

377. This complete relinquishment of any further interest amounted to a renunciation of rights over the phosphate that under the original concession ran to the year 2000. This enabled Nauru to get the full economic benefit of the

phosphate, which Australia at the time estimated would, over 25 years, enable Nauru to build up a fund of $400 million to ensure the economic well-being of the population (United Nations, *General Assembly Official Records, 22nd Session, Fourth Committee*, Doc.A/C.4/SR1739).

378. As the Administering Authority contemplated, and as has in fact occurred, Nauru has had the benefit of considerable phosphate income since independence which, properly managed, should have provided a substantial income for Nauru and put it in a position where its future was secure. The disposition of funds made by the three Partner Governments allowed for this. It is worth noting statements made in the few years prior to independence that indicate the wealth then available to the small Nauruan population. In 1965, Australia told the Fourth Committee that it estimated the proposed royalties and an extraction rate of 2 million tons a year meant that the Nauruans would receive the equivalent of some $4 million a year.

> "As a result of those royalties, the average income of the island, according the recent United Nations survey was the second highest in the world surpassed only by the United States" (United Nations, *General Assembly Official Records, 20th Session, Fourth Committee*, Doc.A/C.4/SR.1588.)

379. In 1967, Australia told the Fourth Committee that during the years of the Trusteeship the Nauruans had enjoyed an enviable prosperity:

> "The per capita income at 30 June 1966 had been over US$1,800, higher than the per capita income of Australia and one of the highest in the world."

380. And, the representative of Australia continued, in explaining the outcome of the 1967 phosphate negotiations:

> "The agreement provided for the supply of 2 million tons of phosphate per year at the price of $US12.10 per ton fob which would mean an annual return to the Nauruans of $15 million. The Nauruan authorities would set up the Nauru Phosphate Corporation.... If the price of phosphate and cost of production remained in the same relationship as at present and the Nauruans continued to put aside the same proportion of their funds as in the previous year, they would build up a fund which, in twenty five years, would stand at

> approximately $400 million. In that way the economic well being of the population would be ensured once the phosphate deposits were exhausted" (United Nations, *General Assembly Official Records, 22nd Session, Fourth Committee*, Doc.A/C.4/SR.1739).

381. This economic well-being was recognised in an article that appeared in the magazine *National Geographic* in September 1976 entitled "This is the World's Richest Nation - All of It!" (Annex 32 to the Preliminary Objections).

382. The Australian Department of Foreign Affairs and Trade commissioned an independent study which examines Nauru's income from phosphate both before and after independence (Annex 26 to Preliminary Objections).[9] It confirms that at independence Nauru's per capita income was one of the highest in the world. Following independence, while information is hard to compile, the study concludes that "available evidence suggests that the phosphate income has not always been well spent. Educational and health standards have fallen and large sums of money have been wasted on items such as a national airline" (p.2). The airline in fact consumed 70 per cent of government phosphate revenue between 1974-75 and 1987-88. The study also shows that:

(a) from the trust funds available to Nauru at independence, their value in terms of income saved in today's terms would be some $83 million, which by 1995 would have accumulated to $136 million;

(b) the capitalized value of the future stream of profits from the concession from 1968, assuming they continued to 1995, would in today's dollar terms amount to $945 million; and

(c) assuming a Nauruan population of 6,000 in 1995, and adding the savings that could have been made by placing the same proportion of phosphate revenue in trust funds as occurred before independence with the savings available at independence, this fund would provide a per capita income per year of $16,600 - only slightly less than Australia's current per capita income.

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[9] The study was prepared by the Centre for International Economics. This centre is a highly respected, independent firm of economic consultants based in Canberra. It is headed by Dr Andrew Stoeckel, one of Australia's leading economists. Many of its professional staff have had experience in government as well as private enterprise. It has undertaken several major studies in the economics of developing countries in the Asia/Pacific region, and its clients include the World Bank and Australian National Centre for Development Studies.

383. Indeed, even with some of the problems associated with the use of revenue noted in the study, the Trust Funds managed by the Government of Nauru still hold substantial assets. These are set out in the Annual Report of the Nauru Phosphate Royalties Trust for 1988-89, tabled in the Nauruan Parliament (Annex 27 to Preliminary Objections). They include a large number of valuable, sound property investments in Australia, the United States, Guam, the Philippines and other countries.

384. Hence, Nauru could be a community of persons having no necessity to work - living on the substantial income from the phosphate resources. The economic study strongly suggests that the Nauruans were left with adequate resources at the time of independence. Such resources have come from the Trust Funds handed over at independence and the handing over of the total interest in the phosphate industry as a result of the Canberra Agreement.

Section VIII: Conclusion

385. If, as Nauru appears to contend, a duty to rehabilitate arose from the fact that mining would destroy the homeland of a people, this can only be because in some way the circumstances in which this mining took place prevented the well-being of the people of Nauru from being realised. Yet the factual material shows clearly:

(a) at the time of independence, the Nauruan homeland was not destroyed;

(b) the Nauruan people were left in a situation where their economic and social well-being had been secured;

(c) rehabilitation, in the sense of restoration of the area mined during the Trusteeship, was not in 1967 practicable, although particular proposals for restoration and use of the mined out land may have been; and

(d) Nauru was left by the Administering Authority in 1967 with the financial resources to choose how it might in future restore and use the mined-out area for particular purposes, but it has until now not in fact taken any steps actually to restore and use the mined area for any alternative purposes.

386. For twenty-five years since independence Nauru has continued to be a viable island community. It has, in fact, through its own decisions mined twice the area mined prior to independence.

387. It is difficult in these circumstances to see how the trusteeship obligations as set out in the Charter and the Trusteeship Agreement obliged the Administering Authority to rehabilitate the island.

388. One has only to describe the situation that in fact prevailed on Nauru at the time of independence and subsequently to see that it is not a situation remotely like that portrayed by Nauru. One could hypothetically suppose an extreme situation where a whole island became uninhabitable through the actions of an Administering Authority, for instance, through the use of the island for an atmospheric nuclear test necessitating the exclusion for 100 years of any human habitation. Such a situation could clearly be accepted as inconsistent with trusteeship obligations. But the situation on Nauru is clearly not comparable in any way. The mining was accepted, indeed welcomed, by the Nauruans. Australia rejects the Nauruan attempt to equate the two situations which its legal arguments would appear to do.

389. Nauru fails to show that there was any particular duty in relation to rehabilitation separate from the overriding duty of the Administering Authority to promote the well-being of Nauru as a whole so that the people were able to exercise their right to choose independence. For the reasons outlined above, Australia considers that Nauru has shown no legal basis for any such duty to rehabilitate in the Charter, the Trusteeship Agreement (or trusteeship objectives to which those instruments refer).

390. The significance and value of the independence settlement should not be underestimated. Under the terms of the concession, BPC had a right to recover phosphate until the year 2000. As a survey at the time showed, it was common practice in the case of mining operations for sharing arrangements to be negotiated between operating companies and governments. The survey showed a wide variation, influenced by the local economic and political policies and situation, in the percentage of net profit going to government ranging from 35% in the USA to 85% in Chile. Against this background a fifty per cent sharing arrangement between the Partner Governments and Nauru was seen as not unreasonable (Annex 7 to Preliminary Objections).

391. While Nauru argued at the time that the concession was not validly based, the reality was that it had been acquired as a commercial concern by the Partner Governments in 1920, and the expectation was that they would continue to receive the benefits arising from it. There was nothing unusual about the concession to suggest its legal status was not well founded.

392. Australia does not deny the right of Nauru to decide, as did many other newly independent States at this time, that it should acquire total control of the phosphate operation subject to appropriate compensation. And the Partner Governments in the negotiations conceded this right. But the fact that ultimately the phosphate rights were given up for nothing is of major significance in considering whether the means chosen by the Partner Governments discharged the trusteeship obligations. The full extent of the benefits in terms of a significant income stream for Nauru which more than adequately enabled any rehabilitation program to be undertaken has been set out in detail above (paras.382 to 384). If valued as a going concern that was acquired compulsorily it suggests compensation of $90 million would have been payable to the BPC. Yet no such payment was made. Only the physical plant and equipment was paid for at a valuation that benefited Nauru (see paras.370 to 373 above).

393. The 1967 Canberra Agreement, along with the transfer of the trust funds, provided Nauru with the means to choose whether, when and how rehabilitation would be effected. Given the considerable financial provision made for Nauru, it is apparent that Nauru's only complaint is that the Partner Governments did not specifically earmark part of the settlement as allocated to cover the cost of rehabilitation. As the negotiations show, Australia on behalf of the Partner Governments consistently maintained that it had given Nauru the means whereby it could choose for itself whether to rehabilitate. Nauru always wanted more. But this does not establish a breach of any trusteeship obligation to rehabilitate. It points simply to a dispute over the generosity of the phosphate settlement. But that is not the subject of the current dispute.

394. For all the reasons set out in the above sections of this Chapter, Nauru fails to establish that:

(i) there was any obligation under the trusteeship to rehabilitate; and

(ii) Australia, jointly with the two other States comprising the Administering Authority, did not discharge any of the duties incumbent on it according to the law of trusteeship.

CHAPTER 3

NOVEL ALLEGATIONS OF BREACH BASED UPON INTERNATIONAL STANDARDS OR DUTIES ARISING INDEPENDENTLY FROM TRUSTEESHIP

Introduction

395. As well as breach of the Trusteeship Agreement and the Charter, the Nauruan Memorial alleges breaches of general international law, including breaches of principles of self-determination and permanent sovereignty, denial of justice *lato sensu*, breach of duties of a predecessor State and abuse of rights. These allegations are the subject of this Chapter. None finds any support in the contemporary historical record. The last three rely upon asserted doctrines which are incapable of providing separate causes of action in this case.

396. Each supposed breach of international law alleges conduct which, had it occurred, ought properly to have been brought to the notice of the Trusteeship Council, since it fell directly within the scope of the Council's supervision. But the alleged conduct was not raised at any stage, so that either it did not occur, or the United Nations, in particular the Trusteeship Council, failed to discharge its own basic trusteeship responsibilities.

397. As part of the International Trusteeship System, the administration of the Territory of Nauru was governed by Chapter XII of the Charter as well by the 1947 Trusteeship Agreement. The relevant provisions were specifically directed to the conduct of the Administering Authority in relation to the Territory. Of their nature, these provisions subjected the Administering Authority to obligations which were at once more precise and more stringent than those under general international law. As the preceding Chapter shows, the three Partner Governments, including Australia, fully discharged their more rigorous obligations under the Charter and the Trusteeship Agreement. *A fortiori*, then, Australia also met the requirements of general international law. In this Chapter, Australia describes its position at general international law only because that position has been challenged by Nauru.

Section I: There was full compliance with the principles of self-determination and permanent sovereignty over natural resources

398. Nauru alleges that Australia is guilty of "substantial breaches of the principle of self-determination", because it says Australian policies with respect to the phosphate industry involved the supposed "disposal of the territorial foundation of the unit of self-determination accompanied by a failure to provide an adequate sinking fund to cover the costs of rehabilitating the worked-out phosphate lands" (NM, para.413). Nauru also says that Australia is guilty of "a particularly grave series of breaches" of the principle of permanent sovereignty, because Australian policies resulted in "a major resource being depleted on grossly inequitable terms" and "the physical reduction of the homeland of the people of Nauru" (NM, para.419). These are extraordinary claims. If true, the United Nations (as well as the Administering Authority) would have been guilty of most serious wrongdoing.

A: THE UNITED NATIONS WOULD NOT HAVE PERMITTED A BREACH OF THESE PRINCIPLES

399. The trusteeship system was established under the authority of the United Nations. The United Nations had primary authority and responsibility for the system and each Administering Authority remained subject to the General Assembly and the Trusteeship Council throughout its trusteeship (Charter, Arts.75, 76, 81, 85, 87, 88). (The position of the United Nations is examined further in Part III, Chapter 3, Section IV.)

400. It is scarcely likely that the United Nations would have closed its eyes to the supposed breach of the principle of self-determination. First, one of the "basic objectives" of the trusteeship system was the "progressive development [of each Territory] towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned" (Charter, Art.76(b)). In the case of Nauru, the Administering Authority had given an assurance that Nauruans would be accorded "a progressively increasing share in the administrative and other services of the Territory" and that the Authority would "take all appropriate measures with a view to the political advancement of the [Nauruans] in accordance with Article 76(b) of the Charter" (Trusteeship Agreement, Art.5(2)(c)).

401. It is equally unlikely that the United Nations would have permitted the supposed violations of the principle of permanent sovereignty. The economic advancement of the trust territories was also a basic objective of the trusteeship system together with respect for human rights and fundamental freedoms (Charter, Art.76(b) and (c)). Under the Nauru Trusteeship Agreement, the Administering Authority promised, amongst other things, to "respect the rights and safeguard the interests, both present and future, of the indigenous inhabitants of the Territory" and to promote their economic development (Art.5(2)(a) and (b)). The practice of the United Nations, particularly the Trusteeship Council, reflected the substantive operation of the principle which had been adopted by the General Assembly, by resolution 1803(XVII) on 14 December 1962.

402. Had there been any breach of these principles, the Trusteeship Council would have identified and directed the attention of the international community to it. But this did not occur. It will be recalled that although the Trusteeship Council made recommendations to the Administering Authority from time to time, the Council invariably expressed general satisfaction with the conduct of the Administering Authority throughout the Trusteeship. Thus, the Council's 1961 Report recorded:

> "satisfaction [with] the progress made in the Territory during the year under review in various fields, through the efforts of both the Administering Authority and the Nauruan people". (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 16th Session*, Suppl. No.4 (A/4818), Part II, Ch.IV, para.1)

403. In its last annual report before independence, in June 1967, the Council noted that:

> "relations between the Administering Authority and the representatives of the Nauruan people continue to be cordial; that economic, social and educational conditions continue to be satisfactory; and that commendable progress has been made in the Territory". (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 22nd Session*, Suppl. No.4 (A/6704), Part II, para.310: set out in Annex 28 Preliminary Objections)

In the same report, the Council said:

> "The representatives of the Nauruan people reiterated their desire to become independent by 31 January 1968 and specifically proposed that the Island should become a republic within the British Commonwealth.
>
> ...
>
> The Council is gratified to note that the Administering Authority has expressed its sympathetic attitude in connexion with the Nauruans' wish to realize their political ambition by 31 January 1968." (para.332)

404. Under the heading "Economic Advancement", the Council:

> "recalling its belief that every effort will be made to adopt a solution to the phosphate question in conformity with the rights and interests of the Nauruan people, note[d] with satisfaction that an agreement was reached in Canberra in 1967 between the Nauruans and the Administering Authority, whereby the ownership, control and management of the phosphate industry will be transferred to the Nauruans by 1 July 1970.
>
> ...
>
> The Council note[d] further the statement of the Administering Authority that the financial arrangements agreed with respect to phosphate took into consideration all future needs of the Nauruan people, including possible rehabilitation of land already worked." (para.403)

405. The Trusteeship Council's deliberations with respect to Nauru are discussed in more detail in Part I, especially Chapters 3 and 4. The record shows that the Trusteeship Council kept a watchful eye on political and economic conditions in the Territory right up to independence, and that there was never the slightest indication that the Council considered that Australia, as representative of the Administering Authority, had violated principles of self-determination or permanent sovereignty.

406. Further, as shown in Part I, the United Nations was kept well-informed of developments on Nauru during the Trusteeship period. The Trusteeship Council

sought and received detailed information on the Territory. The Administering Authority provided annual reports on all aspects of its administration. There were also the regular Visiting Missions and, after 1961, there was direct Nauruan participation in the work of the Trusteeship Council. See para.63; also see eg para.76 above. If Nauru's claims were true, the Trusteeship Council must have closed its eyes to patent and very serious wrongdoing by the Administering Authority, and the United Nations must have neglected its own very special duty - to supervise the Territory's political and economic development in accordance with the Charter.

407. Had the island been "disposed of" or its major resource depleted on "grossly inequitable terms" as Nauru alleges (NM, paras.413 and 419), the result would have been evident not only to all Nauruans, but to the Visiting Missions of 1965 and earlier who were sent to examine and report on conditions in the Territory. (For the reports of the Visiting Missions, see Annexes 7-12, Vol.4, NM.) This alleged state of affairs would have called for very serious discussion by all relevant United Nations bodies, particularly before any decision to terminate the Trusteeship was made. But the record does not disclose such a discussion.

408. Instead, the contemporary record shows that the Nauruan representative encouraged the United Nations to terminate the Trusteeship on the basis that the emergent State would have a viable economic future, because of its newly acquired ownership of the phosphate resouice. It will be recalled that on 6 December 1967, Head Chief Hammer DeRoburt had assured the Fourth Committee that:

> "During most of 1967, ... work had been under way to prepare the necessary political and administrative structure. Economically, Nauru's position was very strong because of its good fortune in possessing large deposits of high-grade phosphate. ... Already some of the revenue was being allocated to development projects, so that Nauru would have substantial alternative sources of work and of income long before the phosphate had been used up. In addition, a much larger proportion of its income was being placed in a long-term investment fund, so that, whatever happened, future generations would be provided for. In short, the Nauruans wanted independence and were confident that they had the resources with which to sustain it." (United Nations, *General Assembly Official Records, 22nd Session, Fourth*

> *Committee*, Doc.A/C.4/SR. 1739 set out in Annex 30 to Preliminary Objections.)

409. At the Trusteeship Council's Special Session on 22 November 1967, Head Chief DeRoburt assured the Council that:

> "Australia had administered the island of Nauru for almost half a century. Australia's tutelage of [the Nauruan] people, which it exercised also on behalf of the other two partner Governments of New Zealand and the United Kingdom, had been effective. Those Governments could be proud of their achievements, and he wished to thank them, on behalf of the people of Nauru, for the many benefits received.
>
> During the past two decades, the Council had sent to Nauru six visiting Missions which had been instrumental in encouraging and fostering his country's progress towards independence. The burdensome task borne by the Administering Authority for half a century, and by the Council for a shorter but no less significant period, was coming to an end." (United Nations, *Trusteeship Council Official Records, 13th Special Session*, Doc T/SR 1323, in Annex 29 to Preliminary Objections).

410. The result was that on 19 December 1967, the General Assembly resolved that:

> "in agreement with the Administering Authority, that the Trusteeship Agreement for the Territory of Nauru approved by the General Assembly on 1 November 1947 shall cease to be in force upon the accession of Nauru to independence on 31 January 1968." (Resolution 2347(XXII), reproduced in Annex 17, Vol.4, NM.)

411. Nauru's allegations that Australia breached principles of self-determination or permanent sovereignty are utterly inconsistent with Nauruan conduct around the time of Nauruan independence. No Nauruan alleged at that time that the island had become uninhabitable, or that Nauruans had been deprived of a major resource on grossly inequitable terms. Although Nauru did not waive its claim for rehabilitation (*ICJ Reports 1992*, p.250), its representative made it clear to the international community that Nauru saw the question of rehabilitation as quite separate from the matters appropriate for

discussion by the United Nations, ie, self-determination and its corollary, permanent sovereignty. The Head Chief told the Council that rehabilitation:

> "was not an issue relevant to the termination of the Trusteeship Agreement, nor did the Nauruans wish to make it a matter for United Nations discussion." (United Nations, *Trusteeship Council Official Records, 13th Special Session*, Doc T/SR 1323; set out in Annex 29 to Preliminary Objections).

The Head Chief stated unequivocally that Nauruans did not regard self-determination and rehabilitation as related in any way. Given the Nauruan statements made in December 1967, it seems improbable that there were, at the very same time, breaches of the dimensions which Nauru now alleges against Australia.

412. As the Court said in its judgment of 26 June 1992, the resolution of 19 December 1967 had "definitive legal effect" and the Trusteeship Agreement was "terminated" on that date and "is no longer in force" (*ICJ Reports 1992*, p.25, referring to the *Northern Cameroons* case, *ICJ Reports 1963*, p.32). The resolution made no reference to rehabilitation and contained absolutely no indication that there had been any less than total compliance by the Administering Authority with the principles of self-determination, or permanent sovereignty over natural resources.

413. It was for this reason that the Court held, in the *Northern Cameroons* case (*ICJ Reports 1963*, pp.32,37), that it would not inquire into the allegation made by the Republic of Cameroons that the Administering Authority had failed to comply with its obligations in respect of that Territory and, in particular, its obligation under Article 76(b) of the Charter to bring the people of Northern Cameroons to self-government. If Nauru, in the present case, is to substantiate its claim that the phosphate industry policy during the Trusteeship resulted in substantial breaches of the principles of self-determination and permanent sovereignty, it necessarily challenges the decision of the General Assembly in December 1967 that it was appropriate, having regard to the particular circumstances of Nauru, that the Nauruans should exercise their right to self-determination, absent any condition as to the island's rehabilitation.

414. Nauru does in fact allege that the Administering Authority breached these principles and, as the foregoing paragraphs show, this necessarily implies that the United Nations failed too. That is, the United Nations failed to fulfil its own

special duty to the Territory to ensure that the Authority complied with its basic obligations. Given the facts referred to above (and in Part I) and the particular involvement of the United Nations in issues of self-determination, it is impossible to believe that the Organisation could have closed its eyes to such breaches in this way.

B: AUSTRALIA'S RECORD WITH REGARD TO SELF-DETERMINATION IS EXEMPLARY

415. As already noted, pursuant to Article 76(b) of the Charter and therefore under the Agreement, "self-government or independence as may be appropriate to the ... territory and the freely expressed wishes of the peoples concerned" was a basic objective of the Trusteeship. Under the 1947 Trusteeship Agreement, the Administering Authority undertook to promote the political (as well as economic) advancement of the Territory accordingly. Within the context of the trusteeship system, the Trusteeship Agreement contemplated a specific process for Nauruan self-determination. In conformity with that Agreement and during the Trusteeship, the Administering Authority brought the Nauruans to the stage where they were freely able to determine their political status, and having done so, to emerge as a State with a sound economic future.

416. As Part I has shown, under the administration of the joint Authority, there were considerable social and political advancements on Nauru between 1947 and 1968. Amongst other things, education became compulsory for Nauruan children from ages six to sixteen and there was ample assistance to enable children to continue their studies, particularly in Australia. The political and administrative system was altered over time to allow for progressively more Nauruan participation in government until complete independence in 1968. In 1951 the Nauruan Council of Chiefs was replaced by the Nauru Local Government Council, an elective body with considerable influence. Its powers were enlarged in 1963, and in 1965 Nauruans were granted even more autonomy, the details of which are discussed in Part I. As well, Nauruans increasingly assumed senior administrative posts.

417. Clearly, Australia (on behalf of the joint Authority) fulfilled the undertaking to give Nauruans an increasing share in the government of the Territory, so that they might freely choose their political status. In preparing Nauru for independence, Australia's conduct was exemplary. As Part I has shown, in agreeing to terminate the Trusteeship Agreement, the Administering Authority and the United Nations acted totally in accordance with the wishes of

the Nauruan people. Independence was, in every sense, the result of "a free and genuine expression of the will of the people concerned" (*Western Sahara* advisory opinion, *ICJ Reports 1975*, p.32). As the United Nations noted, 31 January 1968 was the date which the Nauruans themselves chose for independence and the Administering Authority respected their choice. See Part I. As the Australian Minister for Territories stated, Nauruans sought and were given "full and unqualified independence" (para.70 above).

418. But it is said that the principle of self-determination was breached because of the "disposal" of the unit of self-determination together with the "failure to provide an adequate sinking fund to cover the costs of rehabilitating the worked out phosphate lands". This, it is said, was compounded by "a refusal to provide relevant economic data" to the Nauruans or the United Nations (NM, para.413).

419. As the next Chapter (Section I) shows, there is no basis in fact for the last allegation as to the provision of economic date. The allegation is entirely inconsistent with the conduct of the United Nations at the relevant time; and cannot arise for consideration in this case which concerns only the matter of rehabilitation.

420. Nor does the historical record support the Nauruan claim that the unit of self-determination was destroyed. During the Trusteeship period, what happened was that the BPC, with the knowledge and consent of the Nauruans and of the United Nations, mined for phosphate on the island. But the area actually worked out by the BPC between 1947 and 1967 was no more than one third of the total area worked out between 1906 and now. Further, the real value of the land in question lay only in the phosphate mined first by the BPC and subsequently, by Nauru. That land, it should be recalled, has never been used for agricultural or residential purposes and has always had an erratic rainfall. For this reason, even before mining took place, the phosphate lands would not have been capable of supporting anything like the present population of Nauru, otherwise than through phosphate exploitation. See eg, CSIRO report, 18 January 1965, Annex 20 to Preliminary Objections and para.144 above; Davey Committee report, Annex 3, Vol.3, NM, and para.149 above. Mining and a less aesthetically satisfying environment have been the price of Nauruan prosperity. This is a price which the Nauruans themselves have accepted; for it should also be borne in mind that Nauru itself has, since independence, continued to mine for phosphate, and at an even greater rate, without commencing rehabilitation.

Phosphate mining has not been treated by Nauru as anything other than an appropriate means of advancing the Nauruan economy, to support its growing population. This reflects the island's particular-characteristics. Since 1906, Nauruan economic development has depended almost entirely on phosphate mining, more especially in the Trusteeship period before investments from phosphate revenue had an opportunity to accumulate.

421. Finally, Nauru's own conduct since independence is altogether inconsistent with its allegation that Australian policies involved the "disposal of the territorial foundation of the unit of self-determination", or "the physical reduction of the homeland of the people of Nauru". For during the twenty-five years since independence, Nauru has continued to mine, at a faster rate than ever before (NM, para.207). Further, Nauru did not develop or begin to carry out any rehabilitation program during that period. As a result, Nauru itself has already mined more than twice as much of its phosphate lands as did the former Administering Authority in the Trusteeship period. Nauruan claims that Australia is guilty of breaches of principles of self-determination and permanent sovereignty are to be set aside as entirely without foundation.

422. Nauru's complaint that it was not given an adequate sinking fund for rehabilitation is also unjustified. The previous Chapter shows that the means by which the Administering Authority chose to discharge its obligations (under Article 76 of the Charter and Articles 3, 4 and 5 of the Trusteeship Agreement) was to make more than sufficient financial provision to ensure the Nauruans a secure future, so that they might, if they so chose, undertake a properly planned rehabilitation scheme. The reasons for this have already been discussed: see Part II, Chapter 2. No question now arises as to the sufficiency of those funds to achieve that result, for Nauru itself concedes that it has in fact adequate funds to undertake the task. This is, indeed, not surprising, having regard to the generosity of the 1967 Canberra Agreement and to the funds transferred to Nauru on independence. See Part II, Chapter 2, Section VII. This should have assured to Nauru a prosperous future. Nauru's claim here as elsewhere in its Memorial is that, regardless of the generosity of the financial provisions made in 1967, the Administering Authority ought to have given it a fund specifically designated for rehabilitation. But this is far removed from the asserted breach of the principle of self-determination.

423. There might have been a breach of the principle of self-determination if Australia had prevented or hindered the Nauruans from choosing to be

independent. But this was not the case. There might also have been a breach if Australia had in fact deprived the people of the island which was to be their territorial unit of self-determination. There might then have been no valid act of self-determination at all. But this was not the situation on Nauru. Nauru's claims in this regard are without any foundation in fact. On the contrary, with the termination of the Trusteeship in January 1968, there emerged an independent State on an island which could not only support its population at the time but, on account of its phosphate resources, promised them a prosperous economic future (paras.376 to 384 above).

C: AUSTRALIA RESPECTED THE PRINCIPLE OF PERMANENT SOVEREIGNTY ABSOLUTELY

424. The principle of permanent sovereignty requires that every State recognize "the inalienable right of all States freely to dispose of their natural wealth and resources in accordance with their national interests" (General Assembly resolution 1803(XVII), preambular para.5). Resolution 1803(XVII), adopted by the General Assembly on 14 December 1962, has been seen as the crystallization of this principle: see *Texaco v Libyan Arab Republic* 53 ILR 389, at pp.487, 491-2; *Kuwait v American Independent Oil Co (Aminoil), (1982) 21 International Legal Materials*, p.976, at p.1021; Higgins [1982] *Recueil des Cours*, Vol iii, p.293; Lachs [1980] *Recueil des Cours*, Vol.iv, p.57; Brownlie [1979] *Recueil des Cours*, Vol.i, p.261. The question whether international law on this subject altered during the trusteeship period need not be answered, for the fact is that Australia has acted completely in accordance with the demands of the principle. For the same reason, there is no need to consider whether the principle in fact entitles Nauru to rely on Australia's alleged responsibility as the representative of the former administering power, although that question is not without doubt (*cf* Bedjaoui, "The Right to Development" in *International Law: Achievements and Prospects*, UNESCO, Paris, 1991, p.1190; Gess, "Permanent Sovereignty over Natural Resources" (1964) 13 *International and Comparative Law Quarterly* 398 at 415; Fischer, "La souveraineté sur les resources naturelles" AFDI, 1962, p.516 at 526; Elian [1976] *Recueil des Cours*, Vol.v, p.48).

425. As Part I, Chapter 3 and Part 2, Chapter 2 make clear, arrangements with respect to royalties and ultimately, the entire Nauruan phosphate industry altered radically between 1947 and 1968. This was in keeping with similar developments throughout the world. Prior to 1950, long-term concessions

pursuant to which a foreign concession holder acquired exclusive rights to mine in return for comparatively modest royalties and rental were typical of arrangements governing the exploitation of natural resources in many places. The development of the principle of permanent sovereignty led to changes in approaches to foreign mining concessions, however, and, in the period between 1950 and 1967, to increases in the level of royalty payments and other forms of return to producer States. (See Cattan, *The Evolution of Oil Concessions in the Middle East and North Africa, (New York, 1967)*, pp.3-4; *Transnational Corporations in World Development: A Re-examination*, E/C.10/38, 20 March 1978 (UN Sales No.78.II.A.S), pp.102-122, esp 102-3). As part of these developments, there were increases in royalty payments throughout the Trusteeship, particularly after 1963. Even before 1963, royalties paid by the BPC compared favourably to those paid by mine operators in Australia. A paper prepared by the Australian Department of Territories indicates that in July 1958, the rate of royalty impost for zircon was 2/6 per ton; for coal, it was 9d per ton for the first twenty years lease, 1/- per ton for the second, and 1/3 per ton for the third twenty years; and for phosphates, 1/- per ton. Not surprisingly, the paper recorded the view that the proposed payment of 2/6 per ton for Nauruan phosphate was reasonable, having regard to the royalty rates applicable in New South Wales. (The paper appears as Annex 3 to this Counter-Memorial.) It will be recalled that the 1962 Visiting Mission had noted with satisfaction that, since 1947, the percentage benefit to the Nauruans against the value of phosphates at the point of exports had risen from just under 4% to 24%. There were even more significant increases after 1963, as the reports of the Trusteeship Council recorded. There was no indication in these reports that the Council considered that the Administering Authority was failing to ensure that the BPC paid royalties at a rate appropriate to the standards of the day (see paras.102 and 105).

426. At the Nauruans' request and in conformity with the Trusteeship Council's recommendations, a substantial part of these royalties was paid into trust funds for the benefit of Nauruans as a whole. When resettlement proposals failed in 1964, the Administering Authority ensured that an even larger proportion was paid into the Long Term Investment Fund, by way of saving for Nauru's future needs. It will be recalled that as at 30 June 1967 there was over $3 million standing to the credit of the Nauru Landowners' Royalty Trust Fund and about $6.25 million to the credit of the Long Term Investment Fund which, together with other Trust Funds, amounted to almost $A10 million, or $A70 million in 1993 values (para.351 above). At independence, these funds

were passed to Nauruan control to be applied to a rehabilitation program (or any other project) as the Nauruans saw fit.

427. In making the Phosphate Agreement of 14 November 1967, the three Partner Governments recognized the right of the new Nauruan State to dispose of its major resource as it saw fit. Pursuant to that agreement, the Administering Authority (ie, Australia, the United Kingdom and New Zealand) agreed that the BPC should give up its interest in the Nauruan phosphate industry on the terms proposed by the Nauruans. It will be recalled that the Nauruans purchased the BPC's Nauruan assets at their own request (Part I, Chapter 5, para.230). These assets were valued at original price less depreciation at a rate consistent with their economic life (1967 Agreement, Clause 8(1), reproduced as a schedule to Annex 9 to Preliminary Objections). This was not a normal commercial basis. As already noted, a commercial price would have yielded $A30 to $A32 million, rather than the $A21 million actually paid. After a three-year transitional period, the BPC was to transfer the management of the phosphate installations on Nauru to the Nauru Phosphate Corporation, a Nauruan corporation, to manage thereafter (Clauses 13 and 15). Thus, by the time Nauru emerged as an independent State on 31 January 1968, the former Administering Authority had already passed ownership and control of the phosphate deposits to the new State. This was in full accord with the principle of permanent sovereignty.

428. The 1967 Agreement was advantageous for the Nauruans; and the arrangements made under it were much more favourable than strictly required by the then applicable law. See Part 2, Chapter 2, Sections VII and VII. The basis of valuation for BPC's Nauruan assets clearly favoured the Nauruan purchasers (Part II, para.371). Under the Agreement, Nauru acquired the whole industry - the capital assets, the phosphate deposits and the considerable income which phosphate sales generated. Further, the former Administering Authority undertook to take the entire output of Nauruan phosphate at a stated rate of production and at a market-indexed price for at least the first three years (Clauses 5(2) and 23). The three Governments thereby assured the new State a guaranteed market at a guaranteed price. (This arrangement was, of course, subject to extension.)

429. For the three Partner Governments and the BPC, the Agreement involved the relinquishment of valuable legal interests. Until the pre-independence negotiations, the BPC had held undisputed concessionary rights over the Nauruan phosphate deposits which derived from the title of the three

Governments. They had purchased the interest of the Pacific Phosphate Company in 1920. That company had in turn acquired title under a grant made by the Imperial German Government in 1905. The three Governments had transferred the assets and undertaking of the Nauruan phosphate operations to the BPC under an indenture of 31 December 1920 and had vested title to the phosphate deposits pursuant to the 1919 Agreement. See Part I, Chapter 1. The BPC had not lost its concessionary rights when the 1947 Trusteeship Agreement came into force. Had the three Governments not given up their interests (held by BPC) prior to independence, Nauru would have been required to pay appropriate compensation for any compulsory acquisition. This would have included at least full compensation for the BPC's assets, valued at a somewhat higher commercial rate than the historic cost basis of the 1967 agreement. There would, moreover, have been no assured market.

430. At the start of the 1967 negotiations, the three Partner Governments had expected to make some form of profit-sharing arrangement with the Nauruans (Part I, paras.214 to 220). This was in keeping with the fact that the BPC had concession rights over the phosphate to the year 2000. It was also consistent with international practice as it then stood with respect to mining concessions elsewhere in the world. As already noted, the practice of granting concessions to foreign concerns by mandatory powers and administering authorities was an accepted feature of mandate and trusteeship administration. Further, prior to 1950, concession-based royalty and rental payments were typical forms of return received in producing countries. The Saudi Arabia and Aramco agreement of 30 December 1950 introduced the concept of equal profit-sharing between the producer State and the concessionaire in the context of oil concessions. Direct profit-sharing gradually gained wider acceptance so that, by 1967, the concept of mutual sharing reflected in a profit-sharing formula had become well accepted as the appropriate basis for the exploitation of natural resources. See Steiner and Vagts, *Transnational Legal Problems: Materials and Text* (1967), at p.373; H Cattan, *The Evolution of Oil Concessions in the Middle East and North Africa, (1967), ppxi, xii, 3-4, 9-10; Transnational Corporations in World Development: A Re-examination*, E/C.10/38, 20 March 1978 (UN Sales No.78.II.A.S), pp.102-122, esp 102-3, 117.

431. It was in keeping with these international standards that the three Partner Governments sought an equal sharing of the profits of the phosphate industry with the Nauruans. Their approach was also consistent with the conclusions of the 1966 Working Group (Annex 7 to Preliminary Objections). As noted above,

the Working Group identified two different approaches - profit-sharing between operating companies and governments and the return of profits on shareholders' funds (para.390). The available material indicated that a 50:50 sharing between the Nauruan Government and the commercial operator would have been consistent with arrangements elsewhere in the world (para.12 of the Report). By the end of the 1967 negotiations, however, the three Governments had agreed to relinquish all interest in the industry, including any entitlement to a share of the profits or management fee. By so doing, the Governments gave up much they might reasonably have expected to retain. From independence, Nauru thus received the entire economic benefit of the phosphate industry. As the earlier discussion of the 1967 negotiations shows, the three Governments were prepared to relinquish their claim to a proportion of the profits so as to take account of Nauru's particular circumstances, including the fact that the phosphate was a wasting resource. See Part I, Chapter 5 and Part II, Chapter 2, Section VII.

432. It should be borne in mind that, in 1967, direct exploitation by the producing country was not usual and that further significant changes in international approaches to foreign investment in mineral exploitation took place in the fifteen years or so following termination of the Trusteeship. See *Transnational Corporations in World Development: A Re-examination*, referred to in para.430 above. The more radical nature of contractual revisions in the 1970s is illustrated by the revisions made to the original Kuwait concession of 1934, particularly in the 1960s and 1970s, which culminated in the Kuwait Acquisition Agreement of 1 December 1975 (reproduced in Peter Fischer (ed), *A Collection of International Concessions and Related Instruments, Contemporary Series 1975/76*, Vol.2, (1982), pp.133ff). These further changes coincided with, and reflected, refinements in the principle of permanent sovereignty. They can, however, have no bearing on the present case. See para.438 following and Part II, Chapter 1, Section III.

433. In making the 1967 Agreement, the three Partner Governments also recognized that it was for the new Republic of Nauru to decide whether it wanted to embark upon rehabilitation and if so, the particular program it wished to pursue. It will be recalled that as late as June 1966, the Davey Committee of Experts had reported that "the very many practical considerations involved rule out such an undertaking [to rehabilitate] as impracticable". See Part I, para.157. The position of the Administering Authority was clearly understood by the Trusteeship Council which reported that:

> "The basic points in the attitude of the Partner Governments were that the decisions about what steps for treatment of these worked-out mining lands should be taken -whether they should be treated, what treatment should be undertaken, when it should be done and at what use of resources - were ones that should properly be taken by the Nauruans themselves and not by anybody else; and that the responsibility of the Partner Governments was to see that the financial arrangements were such as to ensure that resources would be available to enable the Nauruans to make provision for their future in whatever way the present leaders or their successors might decide.
>
> The Partner Governments thought that they had made sufficient provision in the financial arrangements that had been agreed on. Under these arrangements $US21 million would become available to or for the benefit of the Nauruan community in 1967-1968, amounting on average to about $US40,000 per family, and almost $US18 million a year from 1969-1970 on ... The Partner Governments have agreed that the Nauruan people would receive the benefit of the whole, ie, 100 per cent, of the net proceeds from selling the phosphate at fair value. They did this, although the information assembled by a joint working party of the Nauruan representatives and the Partner Governments which assembled a great deal of information about comparable mining practice elsewhere, showed that there was a well-established basis of sharing of net benefits and that in many cases the sharing was 50/50. The Partner Governments did consciously take into account the very real needs of the Nauruan people to provide for their long-term future because of the extractive nature of the industry and of the small size of the island, in deciding that it should not follow these precedents of sharing." (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 22nd Session*, Suppl. No.4 (A/6704), Part II, paras.401-2; set out in Annex 28 to the Preliminary Objections)

434. The Council noted "with satisfaction" that amongst other things, agreement had been reached to transfer ownership and control of the phosphate industry to the Nauruans (para.403). It did not indicate that the 1967 arrangements were anything less than satisfactory.

435. As noted in Chapter 2 (para.380), Australia's representative assured the General Assembly that the 1967 agreement would provide Nauru with an annual return of about $15 million and that the Nauruans might expect to accumulate a fund of about $400 million, if they continued to put aside the same proportion of their revenue as in previous years. The three Partner Governments clearly believed that this would ensure the economic well-being of the population once the phosphate deposits were exhausted.

436. The Nauruans and the Trusteeship Council concurred with this account (paras.195 to 202 above). It was, therefore, to be expected that the General Assembly would agree to terminate the Trusteeship for Nauru fully, and indeed properly, satisfied that the Charter and general international law standards had been complied with by the Administering Authority. Further, at no time has Nauru sought to impugn the representations made by the Authority to the United Nations concerning the effect of the 1967 Agreement.

437. Nauru's sovereignty over its natural resources is "permanent" in the sense that no action of the former Administering Authority could have deprived it of its legal capacity to regulate exploitation of those resources. Australia would have contravened the principle had it sought to bind Nauru to a long-term arrangement with respect to the phosphate industry, or sought to alienate Nauru's entitlement by claiming its own absolute right to the phosphate deposits. Australia did not adopt either course, however. On the contrary, Australia, together with the other two Governments, ensured that, on independence, Nauru was able to exploit the resource in its own interest. Australia did not seek in any way to prevent or hinder Nauru's operation of the phosphate industry, nor to impair Nauru's enjoyment of unchallenged sovereignty over that resource.

438. When the Trusteeship came to an end in January 1968, the full ramifications of the principle of permanent sovereignty were still being elaborated (Bedjaoui, [1970] *Recueil des Cours*, Vol.ii, p.495; Brownlie, [1979] *Recueil des Cours*, Vol.i, p.270; Hossain and Chowdhury, *Permanent Sovereignty over Natural Resources in International Law* (1984) p.11). Over the past decade or so, different legal arrangements have been formulated for the development of the natural resources of developing countries to give fuller expression to the principle of permanent sovereignty. But Nauru cannot complain that such arrangements were not applied during the Trusteeship, since they were not available to the Administering Authority then, and the

arrangements made by the former Authority must be assessed against the law in force at the time (*Island of Palmas Case* (1928) 2 UNRIAA 829; *Guinea-Bissau v Senegal* (1989) 83 ILR 1, at p.45; and Part II, Chapter 1, Section III).

439. As already noted, Nauru's claim that Australia's administration of the phosphate industry involved breaches of the permanent sovereignty principle finds no support in the contemporary historical record. On the contrary, it is clear that the Nauruans derived considerable benefits from the phosphate industry during the Trusteeship period. The Visiting Missions of 1953, 1956 and 1965 had each commented on this fact (para.349). The 1965 Visiting Mission specifically noted that phosphate mining enabled the community to afford excellent houses, schools and hospitals (1965 Visiting Mission Report, para.2, Annex 12, Vol.4, NM).

440. Further, Nauru's phosphate resources gave it a per capita income at independence which was one of the highest in the world. It should still have a very high per capita income (Annex 26 to Preliminary Objections, discussed in para.382). Nauru's claim that the phosphate has been depleted on grossly inequitable terms is entirely out of keeping with Nauru's very considerable prosperity throughout the trusteeship period and beyond.

Section II: There was no breach of any other general principle of international law

441. Besides alleging breaches of international law specifically relating to non-self-governing territories, Nauru claims that Australia is guilty of breaches of other more general principles. These claims too are insupportable. They are considered below.

A: DENIAL OF JUSTICE

442. Nauru alleges that Australia's supposed failure to make provision for rehabilitation constitutes a denial of justice (Application, para.46; NM, Part III, Chapter 4). According to Nauru, this concept involves "the incidence of gross and manifest error in the application of the relevant legal standards, often associated with a policy of arbitrariness or discrimination" (NM, para.432) and, Nauru alleges, this applies to "the policies, decision-making procedures, and specific transactions, of the Australian Government and the British Phosphate Commission, in relation to the obligations of the legal regime constituted by

Article 76 of the United Nations Charter in conjunction with the Trusteeship Agreement for the Territory of Nauru" (para.434).

443. Plainly, the expression "denial of justice" does not cover every kind of international delinquency. The expression is ordinarily used to refer to international wrongs committed by States in respect of the person or property of a foreigner on its territory, and particularly to injuries committed by an organ of government in connexion with the administration of justice. See Fitzmaurice, "The Meaning of the term 'Denial of Justice'" (1932) 13 BYIL 93, at pp.95, 108. In its narrow sense, the expression relates to the treatment of aliens by judicial organs; in its broad sense, to the treatment of aliens by the State. See Sorensen (ed), *Manual of Public International Law* (1968) pp.557; Lissitzyn, "The Meaning of the Term 'Denial of Justice' in International Law" (1936) 30 AJIL 632.

444. By using the term "lato sensu", Nauru cannot give it a meaning which it does not bear in international law; and even if the facts alleged by Nauru were true, they would not attract the doctrine of denial of justice. At general international law, the doctrine is concerned with the responsibility of a State in relation to aliens and in particular, with the treatment of aliens by a State's judicial organs. It is not concerned with the rights and obligations of trusteeship. In relation to these, the Administering Authority was, of course, governed by the Trusteeship Agreement and the Charter. There can be no analogy between the relationship of a State towards aliens on its territory and that of an Administering Authority towards the inhabitants of a trusteeship territory (NM, para.436). For the latter was appointed by and at all times subject to the United Nations. There is no basis at all for Nauru's contention that the Charter and the Trusteeship Agreement provide a separate cause of action for denial of justice.

445. Furthermore, there is no factual basis for the Nauruan allegations concerning the administration of phosphate lands and royalty payments (NM, paras.438-443). The subject of public finance and royalties during the trusteeship is dealt with in detail in Part I, Chapter 3. It suffices to note here that the BPC paid royalties to Nauruans throughout the trusteeship period and there were substantial increments over the years. For example, it will be recalled that the total royalties paid to Nauruans in 1966 amounted to $A1.75 a ton, in 1967 to $A4.50 per ton (para.93 above).

446. The Trusteeship Council's annual reports concerning Nauru reflected its proper concern to ensure not only that it had adequate information on the size

and destination of royalty payments, but also that royalties were paid to Nauruans on an equitable basis. See Part I, Chapter 3, Section II. The record shows that the Administering Authority provided the Council with such information, either on its own initiative or in response to the Council's requests. Furthermore, the arrangements made by the Administering Authority for the payment of royalties were more than once commended by the Council. See, for example, the reports of the Trusteeship Council in 1959, 1960 and 1965 referred to in paragraphs 100 to 101 and 105 above.

447. If the Authority had been guilty of conduct amounting to a denial of justice, it ought to have been considered by the Trusteeship Council, as such conduct would have fallen within the ambit of its supervisory function. But neither the Council nor any other organ of the United Nations ever intimated that the Administering Authority was guilty of a denial of justice in its administration of the phosphate industry.

B: BREACH OF DUTIES OF A PREDECESSOR STATE

448. In an effort to find some further legal basis for its claim, Nauru contends that, at general international law, "a State which is responsible for the administration of territory is under an obligation not to bring about changes in the condition of the territory which will cause irreparable harm to, or substantially prejudice, the existing or contingent legal interest of another State in respect of that territory" (NM, para.458).

449. Nauru provides no evidence of the widespread acceptance by nations of the relevant principle, as required of it by Article 38 of the Statute of the Court. Nauru seeks to rely instead on obligations arising in very different situations from that of trusteeship and by virtue of specific treaties, rules made under treaties, or other consensual arrangements. It also cites Decree No.1 of the United Nations Council for Namibia (Annex 21, Vol.4, NM), but this citation merely emphasises Nauru's failure to identify any relevant practice. For the differences between the situation in Namibia and Nauru are great: South Africa continued in illegal possession of the former territory in defiance of the United Nations whilst the Administering Authority on Nauru remained at all times observant of United Nations authority.

450. Nauru also refers to the *German Settlers in Poland* case (PCIJ, *Ser. B, No.6* (1923)) and the case of *Certain German Settlers in Polish Upper Silesia* (*PCIJ, Ser. A, No.7* (1926)). Neither provides any evidence for the supposed

principle, however. In the former, the Permanent Court was asked to give an advisory opinion concerning the nature of certain obligations contemplated by the Treaty of Versailles (*PCIJ, Ser. B, No.6* (1923), p.7). The actions of the German and Polish Governments fell to be considered in this context; and the particular provisions of the Treaty governed the Court's conclusions as to each State's respective rights and obligations. In the relevant part of the latter case, the Court was concerned to explain and maintain Germany's competence to dispose of its property prior to entry into force of the Versailles Treaty. It was in this context that the Court said:

> "[O]nly a misuse of this right could endow an act of alienation with the character of a breach of the Treaty; such misuse cannot be presumed, and it rests with the party who states that there has been such misuse to prove his statement." (*PCIJ, Ser.A, No.7* (1926), p.30)

451. If this case has any relevance (which may be doubted), it serves only to show that the (undischarged) burden of establishing such a case as Nauru seeks to make rests at all times with Nauru. But neither of the cases to which Nauru refers provides any authoritative support for the supposed principle for which Nauru contends.

452. Whatever the principles which may govern a predecessor State in relation to its successor, they had no application in relation to an Administering Authority in a trusteeship situation. As Nauru itself concedes, the obligations of the Administering Authority on Nauru were at all times governed by the 1947 Trusteeship Agreement and the Charter (NM, para.464).

453. Furthermore, even if there were some such principle as that alleged, the facts would not attract its operation here. Nauru has clearly failed to prove its allegations. Nauru does not contend that mining *per se* was unlawful, or that it infringed the principle of permanent sovereignty, or was carried on without the consent of the Nauruans. Whilst it appears to assert that a breach arose from the depradation of the natural resources on Nauru, it does not contend that phosphate mining should not have occurred and that the island should have been left in a pristine state. Such a claim would be inconsistent with Nauru's other claim that it was the failure to rehabilitate or adequately recompense that gave rise to Australia's responsibility.

454. As already noted, the record shows that Australia's administration of the phosphate operations was always subject to conscientious United Nations

supervision (paras.399 to 414 above and Part I, Chapters 3 and 4). Australia, representing the Administering Authority, did not harm or prejudice Nauruan interests. On the contrary, according to the Visiting Missions and the Trusteeship Council, Nauruans benefited a great deal from the phosphate revenues throughout the Trusteeship and, at independence, the Nauruans inherited the phosphate industry as a viable operation which assured them a prosperous future .

C: ABUSE OF RIGHTS AND ACTS OF MALADMINISTRATION

455. Finally, Nauru claims that as a result of Australia's alleged acts of maladministration, Australia is guilty of an abuse of rights. Nauru says "the principle of abuse of rights comprehends three patterns of conduct" - preferring the interests of the administration over those of Nauruans; refusing "to report essential data concerning the policies of the administration and their implementation"; and failing to take account of the relevant international standards in relation to the administration of the Territory (NM, para.449). Nauru says that this conduct as a whole "revealed a wilful disregard of the trusteeship regime as a legal process" (NM, para.454).

456. The status and content of the doctrine of abuse of rights is uncertain at international law and there has been little agreement amongst writers or arbitral and judicial tribunals concerning it. It may be regarded as the application of the principle of good faith to the exercise of rights. As Lauterpacht has recognised:

> "There is no legal right, however well established, that could not, in some circumstances, be refused recognition on the ground that it has been abused. The doctrine of abuse of rights is therefore an instrument which ... must be wielded with studied restraint." (Lauterpacht, *The Development of International Law by the International Court*, p.164.)

457. The fact is, however, that international responsibility can arise only if the supposed abuse amounts to an unlawful act which would, in this case, necessarily involve a breach of the Trusteeship Agreement and the Charter (NM, para.444). Nauru, it seems, also recognizes this when it alleges that:

> "In the Nauruan context the rule of law, the idea of due process, was constituted by the international legal regime of trusteeship, and accountability to the United Nations." (NM, para.454)

458. Nauru's meaning is far from clear, but it does apparently (correctly) concede in this passage that there can be no separate requirement of due process or the like, or any responsibility arising from an abuse of rights, unless there has first been a breach of trusteeship obligations. But, as the preceding Chapter demonstrates, there has been no such breach.

459. Further, as the record shows, the claim of abuse of rights has absolutely no factual basis. The relationship between the United Nations, particularly the Trusteeship Council, and the Administering Authority has already been discussed in some detail (Part I, Chapters 3 and 4; Part II, Chapter 2, Section V and VI; and Part II, Chapter 3, Section I). That relationship involved active inquiry on the part of United Nations bodies and co-operative reporting by the Administering Authority. The Trusteeship Council, aided by Visiting Missions and Nauruan representations, sought conscientiously to ensure that the Trusteeship administration was conformable with the Charter, especially Article 76.

460. If Nauru's claims were true, they ought to have been the subject of anxious debate and censure by the Trusteeship Council. On the contrary, the Council was warm in its praise of the Administering Authority's work. In light of the contemporary historical record, it can scarcely be contemplated that the United Nations, through the Trusteeship Council, failed to take any note of the imagined abuses.

CHAPTER 4

NOVEL ALLEGATIONS OF BREACH OF TRUSTEESHIP UNRELATED TO REHABILITATION

Introduction

461. The three preceding Chapters examine Nauru's specific claim that, at international law, Australia was under an obligation to rehabilitate lands mined out during the trusteeship period. The Nauruan Memorial also contains other allegations, however, which are unrelated to the rehabilitation claim. In particular, Nauru alleges that Australia, acting on behalf of the Administering Authority:

- failed to make full and fair reports to the relevant organs of the United Nations on the economic affairs of Nauru, including the phosphate industry (NM, paras.284, 315-6, 320-1, 339)
- failed to exercise governmental authority in a manner appropriate to the obligations of trusteeship (NM, para.364ff);
- failed to promote the political advancement of the inhabitants and their progressive development towards self-government and independence (NM, para.374ff);
- failed to promote the economic, social, educational and cultural advancement of the inhabitants (NM, para.389ff); and
- failed to respect the land rights of the indigenous inhabitants (NM, para.394 ff).

These allegations are dealt with in this Chapter. As the following discussion shows, they each lack factual support (Section I). In any event, the allegations cannot properly arise for decision in these proceedings and they are in conflict with the deliberations and conclusions of the Trusteeship Council and the United Nations (Sections II and III).

Section I: There is no factual basis for any of these allegations

462. The facts do not support any of these five allegations and each allegation is essentially fact-dependent. As the following account shows, Nauru fails to

marshal any evidence in its support and relies instead on vague generalisations and gives few details. Thus, even if it were open to Nauru to raise such matters in these proceedings (which Australia denies), Nauru's claims in this regard cannot succeed because of its failure to present evidence in their support.

A: THE ALLEGED FAILURE TO REPORT FULLY AND FAIRLY HAS NO BASIS IN FACT

463. Nauru alleges that the failure to report and to rehabilitate "form part of a pattern of conduct stemming from ... goals divorced from concern for the purposes of the trusteeship system and inimical to these purposes" and that "the failure to rehabilitate... forms an entirely consistent element in [this] pattern of conduct" (NM, paras.314-5; also NM, Part IV, Chapter 4). It further alleges that Australia's conduct "was characterised by a carefully maintained reticence which amounted to an absence of good faith" (NM, para.319).

464. Nauru adduces no relevant evidence in support of this allegation. Certainly, Nauru refers to records of the BPC, recording some of the internal deliberations of the Commissioners, and relies on isolated and selective passages, especially concerning events in 1946 and 1953 (NM, paras.355-363). But whatever the attitude of the BPC, it evidences nothing about the practice of the Administering Authority, a different body with separate purposes and responsibilities. However characterized, the approach of the BPC is immaterial.

465. The allegation that the Authority failed to report fully to the United Nations is not borne out by the United Nations record and is inconsistent with the detailed nature of the information in fact given by Australia to the Trusteeship Council. Each annual report presented by the Administering Authority to the Council set out the volume of phosphate exported, its value, the amount and distribution of royalties and the sums contributed by the BPC to the cost of the Nauruan administration. These figures were subjected to annual scrutiny by the Trusteeship Council. Triennial Visiting Missions also carefully inquired into these matters. See Part I, Chapter 3.

466. Nauru seeks to make out a case of wrongdoing on the basis that, from time to time, the Trusteeship Council sought further financial information from the Administering Authority (NM, para.339ff). But Nauru fails to take account of the actual responses of the Administering Authority. As noted in Part I, the Administering Authority never failed to reply to the Council's recommendations, either by way of explanation or the supply of the requested

data. Further, the Council's particular concerns regarding royalty payments, reflected in requests for additional information on the BPC in the years 1959-1961, were subsequently met by the introduction of a consultative process (between BPC and Nauruans) for the settlement of royalties and other like payments. As a result, after 1963, the Trusteeship Council no longer sought more detailed information from the Administering Authority on the royalties question. See para.110 above.

467. Nauru says Australia did not provide information on the price paid by the three Governments for Nauruan phosphate and prices obtainable in the world market. But, as shown in Part I, information was given by the Administering Authority to the Visiting Mission in 1962 which showed that the price paid for Nauruan phosphate did not differ significantly from that paid elsewhere in the world. This more than satisfied United Nations concerns.

468. When negotiations concerning the reorganisation of the phosphate industry began in 1965, the proposals made by the three Governments and the agreements reached with the Nauruans were the subject of careful reports to the Trusteeship Council and other relevant United Nations organs. Moreover, it should be borne in mind that there was direct Nauruan participation in the work of the Trusteeship Council from 1961 until the end of the Trusteeship. From 1961 onwards, a Nauruan adviser was appointed to the delegation of the Special Representative of the Administering Authority during the Trusteeship Council's annual consideration of the Administering Authority's report. It was open to the Nauruan adviser to speak on Nauruan affairs, particularly on financial and related matters (para.63 above).

469. It is true that Australia declined to provide the BPC's internal accounting documents to the Trusteeship Council, because the BPC was a separate commercial concern over which it had no independent control. It did not disguise this fact, as Nauru seems to allege, but made its position on this matter very clear to the Trusteeship Council. (See *Trusteeship Council Official Records, 18th Session*, 714th Meeting, 26 June 1956, p.112, quoted in Part I, para.116 ; see also NM, paras.544-545.) This is significant for it was plainly open to the Trusteeship Council to take issue with Australia on this point and it did not do so. Although the Trusteeship Council was clearly very much aware of the need for adequate information concerning Nauruan financial arrangements, it did not censure the Administering Authority for failing to provide internal BPC records, but regarded the additional data supplied by the Authority (concerning

the BPC's Nauruan trading operations) as fulfilling its purposes. See Part I, paras.108 to 119.

B: THE ALLEGED FAILURE TO EXERCISE GOVERNMENTAL AUTHORITY HAS NO BASIS IN FACT

470. This far-reaching allegation in fact reduces to two limited contentions. The first - that Australia should have exercised its governmental powers so as to provide for rehabilitation - forms the subject of previous Chapters (CR91/20, p.83, CR91/22, p.45). This is no more than another way of stating Nauru's claim that Australia's failure to rehabilitate constitutes a breach of international law (*cf ICJ Reports 1992*, p.282 (Judge Shahabuddeen)), a claim discussed earlier. See para.321ff.

471. Secondly, Nauru challenges the system of public finance maintained by the Administering Authority (NM, paras.284, 365ff). This was, Nauru alleges, affected by:

> "the dominance of the phosphate industry and its operations in the life of the island; the independence of the British Phosphate Commissioners in relation to the Administrator; and the fact that the operations of the Commissioners were not subject to taxation." (NM, para.365)

472. The phosphate operations were undoubtedly central to Nauruan life. The revenue from phosphate mining gave the Nauruans great benefits, including excellent social services and public utilities (described in Part I). By the end of the trusteeship, schooling was free and compulsory until age sixteen and medical treatment at a well-equipped general hospital was also free of charge. There had also been significant improvements in environmental sanitation, immunisation and nutrition. These public amenities were noted by successive Visiting Missions (para.347 above). There was little doubt that phosphate mining brought to the Nauruans:

> "greater prosperity and better social services than are enjoyed by any other community of similar size in the Pacific region." (1956 Visiting Mission Report, para.18, Annex 9, Vol.4, NM).

473. Without the phosphate revenue, it would have been impossible to finance and maintain on such a small isolated island the very high standard of living which the Nauruans enjoyed. Australia, representing the Administering

Authority, used its governmental authority to direct the phosphate revenue to this end and bring about this result.

474. The BPC also played an important role on the island, but was there only to manage the phosphate operations (Part I, Chapter 1, Section III above). It is true that the BPC was not taxed. Instead, it was required to pay for the entire administration of Nauru, including social services and public utilities. It did not decide how the sums contributed by it in this way were to be spent, however. This fell to the Administrator, the Nauru Local Government Council and its successor.

475. After 1951, not only did the Nauruans pay no tax at all, as would have been expected in any other country, but from the BPC they also received royalties, surface rights and other payments (see paras.81 to 84 above). Many Nauruans in receipt of direct BPC payments were not obliged to work at all. Others found employment in the BPC's operations.

476. Nauru alleges that Australia failed to exercise governmental authority appropriately because the Administering Authority permitted mining without rehabilitation. But at the time rehabilitation was thought to be either impossible or impracticable, so that Nauru effectively challenges the fact that mining was permitted at all. But it was only by phosphate mining that the Nauruans enjoyed the significant income that enabled them to enjoy the benefits of development missing from other Pacific island territories. Nauru cannot have it both ways. The Authority was bound either to permit mining, making such provision as appropriate for Nauru's future, or to forbid it until such time as rehabilitation became a realistic option, despite the absence of other Nauruan revenue. Australia, for the Administering Authority, chose the former, and at the same time it established a Long Term Investment Fund to cover the community's future needs (para.89 above).

477. *Indeed, by its own conduct since independence, Nauru has tacitly accepted the legitimacy and economic necessity of the pre-independence mining activities.* This is so because, over the last quarter century, Nauru has itself continued to mine in the same way and with, at least, the same intensity as the BPC in the trusteeship period. It has made no attempt since independence to rehabilitate any mined land, whether worked out before or after independence. *It is scarcely conceivable that Australia should be held culpable for the very same mining activities as those carried on by Nauru over the past twenty-five years.*

C: THE ALLEGED FAILURE TO PROMOTE POLITICAL ADVANCEMENT HAS NO BASIS IN FACT

478. Nauru asserts that "the experience of Nauru was essentially one of constitutional and political immobility" from 1919 until 1966 (NM, para.375). As Part I shows, however, this assertion has no regard for historical accuracy. It is very clear that there was significantly more Nauruan participation in governmental matters as Nauru progressed towards complete independence in 1968. After the Nauru Local Government Council replaced the Council of Chiefs in 1951, it exercised a good deal of influence in Nauruan affairs. The NLGC acquired further powers in 1963. In 1965, the Legislative Council was created with even greater autonomy and, as already seen, the Administering Authority freely accepted the Nauruan choice of independence on 31 January 1968. See Part II, Chapter 3, Section I. In this context, the words of the Nauruan Head Chief shortly before independence are relevant. It will be recalled that he then said that "Australian tutelage ... had been effective" and that the three Governments "could be proud of their achievements on Nauru" (quoted earlier at para.197). Expressed on the eve of independence, these sentiments are quite inconsistent with the claim now made by Nauru that Australia failed to promote Nauruan development towards self-government or independence.

D: THE ALLEGED FAILURE TO PROMOTE ECONOMIC, SOCIAL, EDUCATIONAL AND CULTURAL ADVANCEMENT HAS NO BASIS IN FACT

479. In the same vein, Nauru alleges that "there was a total failure to promote the economic advancement of the inhabitants in relation to the resources available" (NM, para.390). Nauru makes a similar allegation in relation to the other forms of advancement (NM, para.392).

480. Enough has already been said in this Counter-Memorial as to the social, educational and cultural advancement on Nauru. See Part I, Chapter 2 and Part II, Chapter 3, Section I. Indeed, Nauru does not seek to rely on any circumstance which might provide the slightest basis in fact for this assertion. There can be no doubt that Australia left the Nauruans healthy and well-educated.

481. Nor is there any evidence to support Nauru's allegations as to economic matters. Nauru alleges that royalty payments were well below an equitable

standard, despite the increases during the trusteeship period. Royalty payments were, however, frequently adjusted. (See eg, the adjustments made in 1947, 1950, 1953, 1957, 1960, 1964 and 1966 following consultations with Nauruans, described in Part I.) It is true that the basis for calculating royalties changed over time, particularly as the principles of permanent sovereignty became more defined. In the early 1950's, royalties were apparently fixed by the Administering Authority having regard to Nauruan needs, not simply the export price of the phosphates. But as the total export tonnage increased in the early 1960s from about 1.2m tons to 1.6m tons, so too the Administering Authority ensured that royalty payments by BPC also increased. There were marked increases in royalty payments, particularly after 1963. This was in keeping with the re-evaluation of foreign-owned mining concessions occurring internationally. Even before this, however, Nauruan royalty payments were entirely consistent with the royalty rates paid by mine operators in Australia. See Part II, Chapter 3 and Annex 3.

482. There can be little doubt that the intertemporal principle applies in this circumstance, so that the question of royalty payments fails to be determined against the law as it was interpreted at the time the payments were made. See Part II, Chapter 1, Section III above. The contemporary record shows that the payments fully complied with the standards of the day. This is confirmed by the results of the Trusteeship Council's scrutiny throughout the Trusteeship period. After some expressions of concern in the mid 1950s, the Council went on to express general satisfaction with royalty arrangements for the remainder of the Trusteeship period. See Part I, Chapter 3, Section II.

483. In considering the matter of royalties, it should also be borne in mind that the Nauruans' financial benefit from the phosphate industry was not confined to royalty payments made directly to individual Nauruans. A substantial proportion of the royalties were placed into investment funds for the benefit of the community as a whole. Hence, as at 30 June 1967, there were about $A3 million (in 1993 values, $A21 million) standing to the credit of the Nauru Landowners Royalty Trust Fund and about $A6 million (in 1993 values, $A42 million), to the credit of the Nauru Long Term Investment Fund (para.89 above). This represented accumulations of part only of the royalty payments made during the trusteeship. As already noted, the Long Term Fund was intended to ensure that the Nauruans had sufficient funds to provide for their needs when the supply of phosphate ended and it is clear that this aim has been substantially achieved. See Part II, Chapter 2, Sections VII and VIII, esp paras.377 to 383. It should be

borne in mind too that, after 1951, the Nauruans paid no taxes; that the cost of the administration was met out of funds paid directly by the BPC; and that, at independence, they acquired all rights to the phosphate revenues under an agreement entirely favourable to themselves.

484. There can be no doubt that at independence and by virtue of the 1967 Agreement (pursuant to which Nauruans acquired the phosphate industry as a going concern for a less than commercial price), Nauru could look forward to an economic future which was much better than their Pacific neighbours. It was Australia (with the other two Partner Governments) which had brought the Nauruan economy to this high level.

E: THE ALLEGED FAILURE TO RESPECT LAND RIGHTS HAS NO BASIS IN FACT

485. Nauru alleges that the failure to respect land rights (in breach of Article 5(2)(a) of the Trusteeship Agreement) was the product of the legal regime with respect to phosphate lands established during the Trusteeship (NM, para.396). Nauru challenges the Lands Ordinances on the basis that "the interest of the individual landowner was placed at the disposal of the British Phosphate Commissioners subject to the payment of "royalties" which were not the result of a process of genuine negotiation ... and ... were ... unrelated to the real value of the resources being disposed of" (NM, para.398). The Nauruan Memorial also contains another allegation concerning the failure to return worked out lands "without undue delay" (NM, para.399).

486. Australia denies that there is any factual basis for these allegations. Nauru itself gives no particulars of the supposed undue delay. In its other "royalties" aspect, the claim repeats the attack already made by Nauru in relation to the alleged failure to promote economic advancement. See paras.479 to 484 above.

487. Royalty payments were fixed on an equitable basis, by reference not only to the export price of the phosphates, but also to Nauruan needs. As already noted, royalty payments were also frequently adjusted and in the period prior to independence following direct consultations between the BPC and Nauruans. The royalties were, at Nauruan request, paid not only to individual Nauruan landowners, but also into funds for the benefit of the whole community. Moreover, the royalty rates to which the BPC was subject were entirely consistent with (and rather higher than) the rates of royalty impost paid by mine operators in Australia. See Part II, Chapter 3, para.425.

488. Moreover, the Lands Ordinances clearly provided compensation in respect of leases granted to the BPC. A review of the Lands Ordinances (para.40ff above) discloses that:

- each Ordinance was made following negotiation with the Nauruan landowners
- payment was made to individual landowners in the form of a lump sum at the time of the initial lease of phosphate-bearing land. This was £20 per acre in 1921, £40 per acre in 1927 and $240 an acre in 1967;
- royalties were paid to the individual landowners, as well as to funds available generally for the Nauruan community; and
- in relation to non-phosphate bearing land used for BPC operations, a sum was paid as annual rental to the relevant landowner for lease over such lands, together with compensation for individual trees destroyed, depending on species and size.

489. Nauru alleges that the 1921 and 1927 Land Ordinances resulted in an "effective 'taking' of the Nauruans' land" (NM, para.86), or were "effectively a form of expropriation" (NM, para.98). At all times, however, the Administering Authority on Nauru acted in accordance with what was accepted internationally as the appropriate standard of the day. As shown in the previous Chapter (paras.429 and 432), when the Trusteeship commenced, it was accepted internationally that mineral exploitation was appropriately effected by the grant of long-term mining concessions in return for royalties and rentals which, judged by today's standards, appear comparatively modest. The Authority acted in accordance with the developing principles of permanent sovereignty and changing standards by ensuring progressively higher levels of royalties were in fact paid to the Nauruans (Part II, Chapter 3). Finally, of course, it passed the entire industry to them and gave up its claim, based on the international practice of the time, to any further share in the industry's profits.

490. If Nauru was to prosper economically it was necessary to mine the phosphate lands. In return for mining, the individual landowners and the Nauruan community were the recipients of direct financial benefits from the mine operators. This was, as Article 5(2)(a) in fact stipulated, "in accordance with [the Administering Authority's] established policy" at the time the

Trusteeship Agreement was made. It was that policy which the United Nations had indicated was acceptable to it.

491. Under Article 5(2)(a) of the Trusteeship Agreement, the Administering Authority undertook to "respect the rights and safeguard the interests ... of the indigenous inhabitants of the Territory; and in particular ensure that no rights over native land in favour of any person not an indigenous inhabitant ... [were] created or transferred except with the consent of the competent public authority". Nauru does not show, however, that Australia acted otherwise than in accordance with established policy in relation to the rights of indigenous people, nor that Australia permitted the creation or transfer otherwise than with the consent of the competent public authority. Even if there were some more general and as yet unidentified obligation (which Australia denies), Nauru cannot show any factual basis for its assertion that Australia failed to respect Nauruan land rights.

Section II: The termination of the Trusteeship and the judgment of the Court preclude the consideration of allegations unrelated to the rehabilitation claim

492. Thus far, the factual bases of these five Nauruan allegations have been considered, even though unrelated to Nauru's rehabilitation claim. In truth, however, the rehabilitation claim cannot support any judicial inquiry in these proceedings into Australia's administration under the Trusteeship. There are two reasons for this: first, the Trusteeship was unequivocally terminated by the United Nations to its full satisfaction; and secondly, the allegations made concerning Australia's conduct are entirely inconsistent with the actions of the Trusteeship Council and other United Nations organs during the period of the Trusteeship. As a result, there can be no investigation as to whether Australia together with the United Kingdom and New Zealand breached any obligations other than the supposed obligation to rehabilitate (the existence of which Australia denies).

493. The issue in this case is solely whether Australia has a legal responsibility to rehabilitate the phosphate lands mined out during the Trusteeship (Application, paras.445-9, NM, para.621; CR91/18, pp.10-1; 17, 21). According to the Court's judgment of 26 June 1992, what survived the termination of the Trusteeship Agreement was the Nauruan rehabilitation claim and whatever rights the Nauruans might have in this regard (*ICJ Reports 1992*, para.30). There is, therefore, no place for other, unrelated allegations in these proceedings.

494. As the Court also observed in its judgment, resolution 2347(XXII) of 19 December 1967 - terminating the Trusteeship - had "definitive legal effect" (*ICJ Reports 1992*, para.23). In consequence, no question concerning the Administering Authority's compliance with its obligations with respect to the Territory can arise, except the question of rehabilitation which survived only because of the "particular circumstances of the case" (*ICJ Reports 1992*, para.30). Nauru cannot now raise any question concerning the adequacy of reports made by the Authority to the United Nations, or the fulfilment of its obligations of result to promote Nauruan political and economic advancement, and to respect Nauruan rights and interests.

495. The only matter for resolution in these proceedings is the question of rehabilitation. This is indeed consistent with the entire history of the dispute. Until the Nauruan Memorial, this was the only issue which had been raised. Rehabilitation was the only matter on which the three Partner Governments and Nauru had not agreed prior to Nauruan independence (paras.1 to 8 above) It was the matter to which Head Chief DeRoburt referred when he addressed the Trusteeship Council on 22 November 1967 (paras.196 to 198 above). In his 1983 letter the Nauruan President had referred only to the rehabilitation of worked out phosphate lands and it was this claim which Australia had rejected (Annexes 78 and 79, Vol.4, NM). The rehabilitation issue led to the establishment of the Commission of Inquiry in 1986, the Final Report of which, in turn, led to these proceedings (Annex 80, nos.4 and 28, Vol.4, NM).

496. These proceedings cannot, therefore, support a judicial inquiry into the further allegations which Nauru makes, for the allegations are unrelated to the question of rehabilitation. The claim which the Court is to decide is a specific one - whether Australia is responsible for rehabilitating phosphate lands worked out during the Trusteeship.

Section III: The conduct of the United Nations bodies during the Trusteeship excludes the possibility of any other supposed wrongdoing

497. Unlike the rehabilitation claim, the claims discussed in this Chapter were never made to the United Nations, notwithstanding that they cover supposed breaches during the Trusteeship period and they fell directly within the area of the Trusteeship Council's responsibility. They concern matters of such seriousness that it is scarcely conceivable that they would not have been drawn to the Council's attention, either by the Nauruans themselves or by Visiting Missions. In making these allegations, Nauru again fails to take account of the

extensive involvement of the United Nations in the administration of the Trusteeship system. As already noted, this involvement provided for full "securities for performance" by the Administering Authority of its obligations.

498. From its active scrutiny of Nauruan affairs, there was ample opportunity for the Trusteeship Council to assess the adequacy and reliability of the reports made by the Administering Authority to it. There was, however, never the slightest indication that the Trusteeship Council considered that the Administering Authority had failed to meet its obligations of report. Given this and the Council's conscientious pursuit of information concerning the Nauruan phosphate industry, it is virtually inconceivable that the Administering Authority breached any separate duty in relation to its accountability to the United Nations. Moreover, the record shows that Australia gave careful consideration to the Council's requests for information and either supplied the data sought, or explained why it could not do so. The outcome of the Council's scrutiny was invariably satisfaction with the Administering Authority's conduct.

499. It is equally difficult to imagine that, despite the safeguards of the Trusteeship system, the Administering Authority could have been permitted to contravene its basic obligations to promote the political, economic, social and educational advancement of the Nauruan population and to exercise its governmental authority in a manner appropriate to its obligations under the Trusteeship Agreement and the Charter. After all, throughout the Trusteeship, the Trusteeship Council, assisted by regular visiting missions, inquired into the government of the Territory, including the regulation of the phosphate industry and the distribution of phosphate revenue. (Part I, Chapter 3). The Trusteeship Council was well acquainted with the role of the BPC and with the system of public finance on Nauru. It well knew that Nauruans were not (at least after 1951) directly taxed, but that the BPC met the cost of the island's administration (cf Trusteeship Council Report, 1958-9, p.160, quoted in Part I, para.83).

500. In this area, as in others, the relationship between the Council and the Administering Authority was a co-operative one. Thus, when the Trusteeship Council recommended change, particularly in the early 1950s, the Administering Authority acted accordingly. For example, the capitation tax was abolished in 1951, in conformity with the Trusteeship Council's recommendations; and direct consultations between the BPC and the Nauruans on the questions of royalties were instituted at the Council's insistance. On the question of funding through the BPC's contributions, the Council accepted the

Administering Authority's assurance that the continuance of this system was in the Nauruans' best interests (Part I, paras.85-86).

501. The United Nations was well aware too of the cardinal importance of the phosphate industry. Visiting Missions regularly noted that the island's prosperity depended on phosphate revenue (Part I, para.345). The question of royalties was therefore scrutinised with particular care. Throughout the Trusteeship, Australia, on behalf of the Administering Authority, supplied information concerning the quantum of royalties and their distribution. The Council's requests for further information were substantially met by the Authority, either through the provision of additional data or the introduction of a consultative process to set royalty levels. When increases in royalty payments were made later in the Trusteeship, they were paid into the Nauruan Long Term Investment Fund, in accordance with United Nations wishes. In relation to royalty payments, there was not the slightest suggestion that the Administering Authority was acting other than in complete accordance with its obligations.

502. Notwithstanding the seriousness of Nauru's allegations, none can form the subject of judicial inquiry unless Nauru can show that the conduct of which it complains is not only attributable to Australia, but that it constitutes a breach of an international obligation owed to it. This it cannot do. Nauru does not show that Australia is guilty of any conduct which would constitute a breach of its international obligations.

503. The fact is that throughout the Trusteeship, the Trusteeship Council expressed its confidence in the Administering Authority and, in 1967, the Council concluded that "commendable progress has been made in the Territory" (United Nations, *Report of the Trusteeship Council, General Assembly Official Records, 22nd Session*, Suppl. No.4 (A/6704), Part II, para.30, Annex 28 to Preliminary Objections). At the close of the Trusteeship, it was apparent that the United Nations was well satisfied with the Administering Authority. The result of its administration was a well-educated, healthy and prosperous community.

504. The allegations which Nauru now makes are clearly inconsistent with the contemporary historical record. It is, therefore, not surprising that Nauru has been unable to substantiate the allegations considered in this Chapter by reference to the facts. In particular, it fails to show that the relevant obligations of result were not achieved, or that Australia failed to account properly to the United Nations. The United Nations, to which it was ultimately responsible, brought the Trusteeship Agreement to an end on the basis that the Authority had

fully performed its obligations under the Trusteeship Agreement. Nauru cannot invite the Court to second-guess the General Assembly on these matters, or to fail to give considerable weight to its opinion. The only questions in these proceedings are, therefore, whether Australia has a duty to rehabilitate and, if so, Australia has violated that duty. According to Australia, the answer to both questions is, of course, no.

PART III

THE REMEDIAL POSITION

INTRODUCTION

505. If, contrary to the submissions in Part II of this Counter-Memorial, the Court were to find Australia responsible for some breach of an international obligation relating to rehabilitation, the question would arise whether Australia was liable to make any reparation. This is an issue separate from the quantum of any damage, a matter which would need to be the subject of a separate phase of proceedings. But, as the Court has indicated (*ICJ Reports 1992*, p.262), the extent of any responsibility is a matter that arises at the merits phase if the Court finds a breach of international responsibility by Australia. It is for this reason that Australia considers it necessary to deal with the remedial position in this Counter-Memorial. It is, however, included only as a subsidiary matter and Australia considers, for the reasons given in the preceding Part, that no breach of international obligation by Australia can be established.

506. Nauru requests the Court to declare that by reason of Australia's international responsibility, Australia is "bound to make restitution, or other appropriate reparation to Nauru for the damage and prejudice suffered" (Application, p.30-1, para.50; NM, para.621). Australia does not accept any responsibility to rehabilitate worked-out phosphate lands, but even if the Court found against Australia on this point, restitution would clearly not be an appropriate remedy (*cf Forests of Central Rhodope (Merits)* case, 3 UNRIAA, p.1405; *Tito v Waddell (No.2)* [1977] 1 Ch.106, 328)[10]. Other aspects of the remedial position are examined in this Part. If Australia were found responsible, Nauru has disqualified itself from the relief which it seeks by reason of its own conduct (Chapter 1). Additionally, Australia's liability cannot extend to the Mandate period (Chapter 2, Section I). Nor can it extend beyond that proportion of the supposed injury which equity would hold Australia liable to bear, having regard to the co-equal responsibility of the United Kingdom and New Zealand (Chapter 2, Sections II and III) and the supervisory responsibility of the United Nations (Section IV). The question of Nauru's contributory negligence is also examined (Section V).

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[10] In the *Rhodope Forests* case, the tribunal found that Bulgaria had unlawfully confiscated forests belonging to Greek nationals. The arbitrator decided to award damages, rather than *restitutio in integrum* on the basis that it would be inappropriate to compel Bulgaria to restore the disputed forests because it was not likely that the forests were in the same state as they had been in 1918 and, in any event, only some of the dispossessed owners had made claims. The value of the forests was calculated as at the date of dispossession. See 3 UNRIAA, at pp.1432, 1435. In *Tito v Waddell (No.2)*, the Court held that an order for the replanting of part only of the mined-out phosphate lands on Ocean Island would be futile and "a sheer waste of time and money", and that an order for general replanting would be "wholly disproportionate to the meagre and long-delayed benefit that might in the end be achieved". See [1977] 1 Ch 106, at no 327-7 and 328.

CHAPTER 1

NAURU HAS DISQUALIFIED ITSELF FROM THE RELIEF IT SEEKS

507. In its decision on Australia's Preliminary Objections, the Court did not decide "the possible consequences of the conduct of Nauru with respect to the merits of the case" (*ICJ Reports 1992*, p.255, para.38). Australia contends that by reason of that conduct, Nauru cannot now receive the relief which it seeks.

508. At the 1323rd meeting of the Trusteeship Council on 22 November 1967, Chief Hammer DeRoburt declared that:

> "The Nauruan people fully accepted responsibility in respect of land mined subsequently to 1 July 1967, since under the new agreement they were receiving the net proceeds of the sale of phosphate. Prior to that date, however, they had not received the net proceeds and it was therefore their contention that the three Governments should bear responsibility for the rehabilitation of land mined prior to 1 July 1967..." (United Nations, *Trusteeship Council Official Records, 13th Special Session*, T/SR.1323, reproduced in Annex 29, NM)

By independence in January 1968, Nauru had thus clearly admitted responsibility for the phosphate lands mined after 1 July 1967. It has never since alleged that the former Administering Authority has any responsibility in that regard.

509. The admission is significant for two reasons. First, Nauru concedes, as it must, that it continues to carry on phosphate mining without post-mining rehabilitation just as the Administering Authority allegedly did prior to 1 July 1967. Indeed, according to Nauru, it has mined twice the area in twenty-five years as BPC mined in seventy-two years. According to Nauru, about one-third of the 1700 hectares of phosphate lands on Nauru was mined prior to 1 July 1967. Its mining program has covered the rest (NM, para.207). Secondly, on the matter of rehabilitation Nauru assumes that its responsibility is the same as the supposed duty of the Administering Authority, in this way conceding that that duty is no higher than its own.

510. Despite the greater area mined, however, Nauru has not at any time during the past twenty-five years begun to rehabilitate any mined-out land. At most, it has reviewed the matter and has, it says, kept money aside in the event that some program should become feasible. The Administering Authority did no

less. Given this, it might be thought that that Authority had, relatively speaking, accomplished rather more than Nauru has in the past twenty-five years.

511. As Part I has shown, rehabilitation was a matter for active consideration by the Administering Authority both before and after the failure of negotiations for resettlement in August 1964. It will be recalled that, in conformity with the United Nations' own views, the Administering Authority had until then regarded resettlement rather than rehabilitation as the best option for the Nauruan population. In the few years between 1964 and independence in January 1968, the Australian Government first sought and obtained the report of experts on the matter, the Davey Committee Report (paras.155 to 165 above). This report was later commended as "a particularly excellent and far sighted study" by the 1987 Commission of Inquiry (p.1132; see paras.11 to 13 above and paras.514 to 515 below). The Commission added that:

> "Many of the observations and recommendations are as valid today as they were in 1965."

512. Given the state of contemporary knowledge, it would have been foolhardy for the Australian Government (on behalf of the Administering Authority) to have sought to formulate and complete a rehabilitation program between the end of 1966 - following receipt of the report - and independence in January 1968. This was particularly so given the findings of the report (paras.157 to 165 above). The only course then open to the Administering Authority was to leave Nauru with funds sufficient for the task if it chose to undertake it. This was in fact the course adopted by the Authority (Part I, Chapter 5 and Part II, Chapter 2, Sections VII and VIII), and Nauru concedes that today it has such funds (para.7 above).

513. On its own account, however, Nauru has not since independence applied these funds to carrying out rehabilitation. It says that it has accumulated moneys in a public Trust Fund specifically marked for rehabilitation. That Fund was created before independence and has been augmented by the income generated by the phosphate industry which was transferred to Nauru by the three Partner Governments as part of the pre-independence arrangements.

514. Although Nauru says that "from the time of independence" it has undertaken some "preliminary planning", no details of this appear. It says that it has saved the topsoil displaced during mining, but in 1968, as now, it was plain that rehabilitation would involve much more than this. Indeed, it took Nauru some twenty years to appoint another investigatory body - in this case, a

Commission of Inquiry - to review the question of rehabilitation. That Commission presented its report to the Nauruan Government only recently, in November 1988.

515. The Commission observed:

> "For rehabilitation on Nauru to be cost-effective and to ensure that the Republic of Nauru and the Nauruan community as a whole gain most benefit in the future development and usage of the rehabilitated land, it is essential the rehabilitation be designed, scheduled and carried out in accord with the requirements of a Master Land-Use Plan the objective of which is the development of the whole of the mined phosphate lands of Nauru." (p.1141)

Such a Plan has not been established.

It also stated that:

> "Rehabilitation will be a long-term process. It will probably extend over a period of 20 years or more. Careful consideration must be given to decide what the land is to be used for, which land uses have the highest priority and on which areas of Nauru those land uses should be developed." (p.1140)

516. Nauru now claims to have begun a pilot project designed by a member of the Commission (Nauru's Written Statement on Preliminary Objections, para.59), but this is too little too late to show any serious commitment by Nauru to rehabilitation now or during the intervening years. As the Commission emphasized:

> "The apparent lack of motivation among the great majority of the Nauruans for personal involvement and participation is seen, by the Commission, as being the single most significant, likely impediment to the development of the Republic of Nauru in general and the successful rehabilitation of the mined-out lands in particular." (p.1037)

517. In sum, since independence, Nauru has continued to mine just as the BPC did before it. Post-independence mining has not been accompanied by, or made conditional on, a practicable rehabilitation program. The Administering Authority cannot have been under a higher duty in respect of rehabilitation than the beneficiary. Nor can the Authority have been bound to observe a higher

standard of conduct than the beneficiary. Nauru does not attempt to argue so. It must follow either that Australia was under no such duty as that alleged, or if there was a duty to rehabilitate after phosphate mining, Nauru too has been guilty of its breach. But it scarcely seems reasonable to suppose that for twenty-five years Nauru has been acting unlawfully in respect of its own territory.

518. Of course, if it were found that both Nauru and Australia had acted contrary to international law by failing to rehabilitate worked out phosphate lands, Nauru would be unable to press its claim because of the doctrine of unclean hands. Nauru itself concedes that the doctrine covers "conduct on the part of the claimant which is contrary to public international law" (Nauru's written Statement on Preliminary Objections, para.418). But the operation of the doctrine cannot depend on an actual finding that the claimant acted illegally. Nauru's hands are not the cleaner if it is guilty of the same (supposedly wrongful) conduct as Australia. The doctrine of clean hands requires that a claimant's own conduct be consistent with its claim. This is a specific principle forming part of the more general principle of good faith which is applicable in international as in other legal systems: see, for instance, A Miaja de la Muela, "Le rôle de la condition des mains propres de la personne lésée dans les réclamations devant les tribunaux internationaux," *Mélanges Andrassy* (1968) pp.189-213.

CHAPTER 2

AUSTRALIA , IF RESPONSIBLE, CANNOT BE LIABLE ON THE FACTS FOR THE WHOLE OF THE DAMAGE CLAIMED

Section I: No damages are recoverable in respect of the pre-1947 period

519. If Nauru were not disqualified from relief for the reasons set out in the preceding Chapter, it still would not be entitled to compensation for all the loss it claims, even if Australia were found responsible as Nauru alleges. Nauru seeks to impose on Australia responsibility for damage to Nauruan phosphate lands caused by phosphate mining before, as well as during the Trusteeship period (Application, p.30-1, para.50; NM, para.621). But Australia cannot be found liable in this case for damage caused prior to 1947, for the claim made by Nauru is that there has been a breach of a duty (to rehabilitate) which arose under the 1947 Trusteeship Agreement and the Charter, not under the pre-1947 Mandate (see paras.240 to 242 above).

520. It needs to be remembered that in the period prior to the Mandate approximately 630,000 tons of phosphate were shipped (N Viviani, *Nauru* (1970) 35; cf NM, para.289). In the period 1922 to 1941 8,254,990 tons were shipped. In the period 1947 to 1966, 23,347,636 tons were exported (Viviani, *op cit* 186-7). Hence the pre-trusteeship period mining represents roughly 25 percent of the total phosphate mined prior to independence. Australia considers that Nauru has no possible legal claim in relation to the period prior to 1947. Yet Nauru fails completely to make a distinction between the two periods and talks in general terms of all phosphate lands mined prior to 1 July 1967. Mining in the pre-1947 period cannot be in the same position as that post-1947. The Nauruan claim is one for rehabilitation under the Trusteeship. On this basis the surface area mined during that period, and not the actual tonnages, are relevant. Nauru alleges that one third of the island was mined prior to independence. It does not say how much of that was mined prior to 1947, or between 1947 and 1967. Yet that is critical information. Australia only has information on tonnages and has been unable itself to identify the relevant areas mined at the different times.

521. If the Nauruan claim is read as a claim for rehabilitation of land mined during the Trusteeship (as indeed it must), the deficiencies in Nauru's case become plainer still. Nauru, for example, asserts that one-third of the phosphate lands had been mined by the BPC prior to independence (see NM para.207; but

compare NM, para.289: "one third of the surface of the island"); but it is silent on the relevant matter - the proportion of land mined during the Trusteeship period. Evidently, Nauru has sought to develop a case against Australia based on highly prejudicial generalities, but few, if any, relate to the claim which is in fact before the Court.

522. This is not to say that the Trusteeship Agreement did, or was intended to, wipe the historical slate clean in Nauru. It came into force with Nauruan political, social and economic institutions still in place. Thus, the character of the Nauruan Trusteeship must, to some extent at least, depend on the circumstances in the Territory when the Trusteeship came into being. For this reason, it is not said in this Counter-Memorial that a matter is irrelevant to an assessment of the Nauruan claim simply because it has its origins in the Mandate. For example, any consideration of the relationship between the Trusteeship Agreement and the Nauru Island Agreement of 1919 must bear in mind that the 1919 Agreement was valid at international law and binding upon the parties to it in 1947 when the Trusteeship Agreement was approved by the United Nations General Assembly; and indeed its continued application was confirmed by Article 4 of the Trusteeship Agreement (see Part II, Chapter 1, Section IV). There was no suggestion that the approval by the General Assembly of the Trusteeship Agreement brought an end to the 1919 Agreement. Nauru fails to have regard to this circumstance in propounding the view that the 1919 Agreement was in some sense inconsistent with the discharge by Australia of its trusteeship obligations. But the continued relevance of the 1919 Agreement during the Trusteeship or the continuation of particular arrangements in relation to the phosphate industry that had existed under the Mandate does not entitle Nauru to claim damages arising from alleged breaches of the Trusteeship for acts carried out in the period prior to the Trusteeship.

523. The Mandate and the Trusteeship gave rise to different rights and obligations (*cf* Judgment of 26 June 1992, *ICJ Reports 1992*, p.256, para.41). After all, the United Nations granted the Mandate to "His Britannic Majesty", whilst the Trusteeship Agreement appointed a joint Administering Authority constituted by Australia, New Zealand and the United Kingdom. The conduct of the Mandatory Powers is simply not in issue in this case. Accordingly, the question of responsibility for damage prior to 1947 does not arise.

Section II: Australia would not be liable for the whole of the damages claimed for the Trusteeship period

524. At the Preliminary Objections stage, Australia argued that because its liability, if any, was collective with the United Kingdom and New Zealand, Nauru's claim could only be brought against all three States, not Australia alone. But in its judgment on Australia's Preliminary Objections, the Court held that the claim was not, for this reason, "inadmissible in *limine litis*" (*ICJ Reports 1992*, pp.258-9, para.48). At the same time, it specifically reserved for the merits the question whether, if found responsible, Australia would be liable for the whole, or part only of the damage (*ICJ Reports 1992*, p.262; *also* pp.286, 290 (Judge Shahabuddeen)).

525. There is, as the Court acknowledges, a clear distinction between responsibility *stricto sensu* and the consequences of violation. Even if it were held responsible, the consequences for Australia would not be the same as if it had acted alone, rather than, as was the case, in conjunction with the United Kingdom and New Zealand under United Nations supervision. The facts cannot be ignored in this fashion. Australia cannot be required to meet the totality of the damage, because it acted at all times in conjunction with the United Kingdom and New Zealand and responsibility under the Trusteeship Agreement was joint, or equal and collective. Alternatively, Australia acted not only for itself, but as agent for the United Kingdom and New Zealand as well (*cf ICJ Reports 1992*, p.280 (Judge Shahabuddeen)). However characterized, if there has been any failure, it was a failure in which all three States participated. Australia cannot, in accordance with accepted principles of international law, be required to meet the alleged damage which is due to the other two States, and to the United Nations. The legal bases for this contention are discussed below (Part III, Chapter 3).

A: THE UNITED KINGDOM AND NEW ZEALAND SHARED EQUAL RESPONSIBILITY WITH AUSTRALIA IN FACT

526. It cannot be correct to say, as Nauru has done, that New Zealand and the United Kingdom "never had actual legal or administrative responsibility over Nauru" (CR 91/22, p.45; CR 91/20, p.76). For this is entirely inconsistent with the fact that the United Nations had charged the *joint* authority with *legal* responsibility for the administration of Nauru, under its supervision. The three States had such responsibility jointly, whether they chose to exercise it directly, or for convenience, to delegate its performance to one amongst them.

527. Whatever Australia's special role, it could not alter the fundamentals of the legal arrangements required by the Charter and the Trusteeship Agreement (*cf ICJ Reports 1992*, p.326 (Judge Ago)). According to these, Australia at all times acted on behalf of the Administering Authority, i.e., on behalf of the United Kingdom, New Zealand and itself. It was this arrangement which was sanctioned by the United Nations (*cf ICJ Reports 1992*, p.340 (Judge Schwebel)).

528. Again, it cannot be correct to say, as Nauru has done, that the United Kingdom and New Zealand could not have retracted the authority delegated by them to Australia. Article 4 of the Trusteeship Agreement did not (indeed, could not) deprive either State of this residual power, particularly in the event that Australia failed to fulfil its obligations to them, including its duty to administer the Territory in accordance with the Trusteeship Agreement. If this were not so, it would have been virtually impossible for the United Kingdom and New Zealand to have discharged their trusteeship undertakings in good faith. Certainly, Article 4 sought to ensure that no one of the three States could unilaterally alter the agreed arrangements, but this only emphasized the joint character of their responsibility. For, whatever the arrangements between them, so far as the United Nations was concerned the three States were equally responsible in accordance with their undertakings, and as joint members of the Administering Authority.

529. Nor is it true to say that the United Kingdom and New Zealand could not have challenged Australia's administration (CR 91/20, p.75). The United Kingdom and New Zealand each had a juridical interest in Australia's performance (on their behalf) of the obligations of trusteeship; and either State could have taken steps to remedy a failure in the Australian administration, particularly if it involved a breach of the obligations which bound all three. Either State might have complained to Australia if it had been dissatisfied with the Australian administration; and had Australia disregarded its complaints, it might have indicated its concern to the United Nations to which it was ultimately responsible. Such a competence was inherent in the establishment of the joint Administering Authority under the authority of the United Nations; and it did not need to be specifically expressed.

B: WHATEVER AUSTRALIA'S ROLE ON NAURU, AUSTRALIA ACTED NOT ONLY FOR ITSELF BUT FOR THE UNITED KINGDOM AND NEW ZEALAND

530. That Australia acted in a representative capacity throughout the Trusteeship is confirmed by the Agreement to which Article 4 referred. The 1919-1923 Agreement bound each of the three States. It recorded their arrangements for the appointment of an Administrator, in the first instance by Australia and thereafter "in such manner as the three Governments decide" (Art.1). Australia continued to appoint Administrators only because the three Governments so decided. Pursuant to Article 3 of the supplementary Agreement of 1923, however, the other two States were entitled to require information regarding the Territory's administration from the Administrator, though not appointed by them. Subject to the changes effected by the 1965 Agreement, the arrangements made under the 1919-1923 Agreement remained on foot until shortly before Nauruan independence (para.56 above).

531. The fact is that Nauru falsely diminishes the roles of the other two States (CR 91/20, pp.80-1). There was a consistent pattern of consultation, discussion and negotiation between the three Governments in relation to all significant political, economic and social developments on Nauru; and the practice of the three States confirms that Australia acted in a representative capacity throughout the Trusteeship. Thus, Australia appointed an Administrator only after consultation with the United Kingdom and New Zealand (Part I, para.61). There were also tripartite consultations on other significant matters. As paragraph 68 shows, each of the Governments actively participated in the negotiation and conclusion of the Agreement of 26 November 1965 (which led to greater political autonomy for Nauru) and the Agreement of 14 November 1967 (which transferred ownership of the phosphate industry to Nauru).

532. All three Governments were active in the development of proposals for resettlement and committed themselves jointly to facilitating this. As already noted, it was the failure of the proposals for resettlement which led to consideration of the question of rehabilitation.

533. The arrangements for Nauruan independence, including the transfer of ownership of the phosphate industry, were the result of lengthy consultations amongst the three Governments. At every stage from resettlement to the ultimate phosphate agreement this led to sets of joint proposals. These formed the basis of later negotiations with Nauruan representatives. The record shows that in pre-

independence discussions with Nauru, Australia did not make any proposal to the Nauruans which had not first been considered and agreed by the other two Governments (see Australia's Preliminary Objections, paras.334-337). If Australia acted as chief spokesman, it so acted only at the behest of the United Kingdom and New Zealand.

C: NO ONE PARTNER GOVERNMENT COULD MAKE UNILATERAL DECISIONS OF MAJOR IMPORTANCE TO THE TERRITORY

534. The joint involvement of the United Kingdom and New Zealand in cardinal decisions is consistent with the incapacity of any one of the three States to perform the major responsibilities of the joint Authority by itself. Each was dependent on the other. For example, Australia could not have agreed to Nauruan independence absent the consent of the other two States. Their consent would have been required by the United Nations (*cf ICJ Reports 1992*, p.280 (Judge Shahabuddeen)). This was, of course, clearly appreciated by the three Governments. A consensus was required amongst all three States. More particularly, Australia could not have agreed to commit the Administering Authority, or the BPC, to the cost of rehabilitating the land worked out by the BPC without the consent of the United Kingdom and New Zealand. The very magnitude of any such program would have called for the agreement of the other members of the joint Authority. In a practical sense, no rehabilitation program could have been carried out successfully without the co-operation of the BPC, its three Commissioners and hence of all three Governments. It is not, therefore, surprising that in pre-independence discussions, Nauru sought the assent of the three Governments to undertake the task, or bear the cost of rehabilitation (para.219).

535. Further, had Australia sought unilaterally to commit the BPC to a rehabilitation program, it would have breached Article 13 of the 1919-1923 Agreement, preventing any unilateral interference by any Government in the management and control of the business of working the phosphate deposits. Referring to this provision in *Tito v Waddell (No 2)* Megarry V-C observed:

> "This article established the independence of the British Phosphate Commissioners as against any one or two of the three governments, though not, of course, against all three acting in concert." ([1977] 1 Ch.106, at p.152)

536. Plainly, the purpose of the provision was to prevent the unilateral interference by any of the three Governments in the business of the BPC - the

working, shipping and selling of phosphates. Control of the business was to be left to the Commissioners, who alone represented the three Governments in relation to this joint commercial venture. The provision was designed to strengthen the BPC's independence and thereby enhance its position as a commercial venture. Thus, it was intended to restrain Australia, just as much as the United Kingdom and New Zealand. This was so, notwithstanding that in relation to governmental matters Australia administered the Territory not only for itself but also for the other two Governments. In keeping with this, the Administrator's powers were expressed to be "subject to the terms of this Agreement" (1919 Agreement, Art. 1). Had the parties intended the Trusteeship Agreement to alter this arrangement, they would presumably have said so expressly. Instead, they apparently affirmed it.

537. Further, the arrangement was not inconsistent with the Trusteeship, for the function of the Administering Authority was a public one which did not involve the internal management of a business operation. Article 13 of the 1919 Agreement left the Administering Authority free to regulate the governmental, or public, aspects of the phosphate industry which were its proper concern. But if there was any failure in this regard, it was the failure of all three States. For under Article 4 of the Trusteeship Agreement and in practice, Australia acted, or failed to act, on behalf of the joint Authority.

D: THE PHOSPHATE INDUSTRY WAS OWNED BY ALL THREE STATES

538. In addition to the administrative regime established under the Trusteeship, the tripartite character of the ownership of the Nauruan phosphate industry provides yet another strong reason why Australia should not be required to meet more than a proportionate share of the damage. The 1919 Agreement established the BPC as a tripartite body with joint or collective responsibility for running the Nauruan phosphate business, the ownership of which enured to the three Governments. The Agreement vested ownership of the industry in three Commissioners, each of which was appointed by one of the three Governments (Art.2). Each Commissioner held office "during the pleasure of the Government" which appointed him (Art.4). The three Governments agreed that title to the phosphate deposits, and to the undertaking generally should vest in the Commissioners as their representatives (Art.6). Phosphate deposits were not to be sold for the purposes of the Commissioners, but "for the purpose of the agricultural requirements" of each of the three Governments "so far as those requirements extend" (Art.9). Phosphate was not to be supplied

elsewhere without "the unanimous consent" of the Commissioners (Art.10).

539. The Commissioners were co-equal; and each had the same rights and obligations. There was no question of predominance. Further, Nauru concedes that through their representatives, the three Governments had equal authority in relation to the management and control of the phosphate industry (CR 91/20, p.81). This position is confirmed by the agreement reached with the Nauruans in November 1967, pursuant to which the three Governments agreed to sell the assets and undertaking of the phosphate industry to a Nauruan enterprise.

540. Any failure, if failure there was, to rehabilitate was that of the BPC which was the joint enterprise of the three Governments. As a matter of equity, responsibility for such a failure must therefore be shared amongst the three States at whose instance the three Commissioners acted. Moreover, it should be noted that under the 1919 Agreement each State sought the same benefit - phosphate for its national agriculture. It would be quite inequitable to hold Australia liable by itself to bear the entire burden of reparation.

541. Given this, Nauru's contention (that BPC's tripartite character is not relevant because the Commissioners were not parties to the Trusteeship Agreement, CR 91/20, pp.81-3) misses the point. The fact is that the Commissioners were appointed by and acted for the three States concerned. The Trusteeship Agreement specifically mentioned and approved the continued operation of the instrument to which they owed their existence and which controlled their operations (Art.4). Through the BPC, the three States together enjoyed the real beneficial ownership and enjoyment of the phosphate industry. Given all this and that any failure to rehabilitate was that of the BPC, it would be inequitable to hold Australia liable, more than two decades later, to bear the totality of the damage.

542. Nauru says that Australia should not have permitted the BPC to mine on the basis that it did (*cf* CR 91/20, p.83). But the phosphate industry was subject to the provisions of the 1919 Agreement between the three Partner Governments. Australia could not unilaterally make decisions in relation to the industry. The active involvement in the phosphate industry of the United Kingdom and New Zealand (through their respective Commissioners) is clearly relevant to any liability to pay compensation. If, as Nauru says, Australia's involvement through the BPC in the phosphate industry is relevant, then so too must be the involvement of the United Kingdom and New Zealand.

E: ANY LIABILITY UNDER THE TRUSTEESHIP AGREEMENT IS EQUAL AND COLLECTIVE WITH THE UNITED KINGDOM AND NEW ZEALAND

543. The obligations of the three States under the 1947 Trusteeship Agreement were joint; and hence their liability for breach, if any, would be equal and collective. This flows from the terms of the Charter and the Trusteeship Agreement; and could not be altered by extrinsic facts (*cf ICJ Reports 1992*, p.274 (Judge Shahabuddeen)).

544. Article 81 of the Charter provides that an Administering Authority for a trusteeship territory "may be one or more States, or the Organisation itself". In conformity with this, Article 2 of the Trusteeship Agreement designated the authority which was to exercise the administration of Nauru as follows:

> "The Governments of Australia, New Zealand and the United Kingdom (hereinafter called "the Administering Authority") are hereby designated as the *joint* authority which will exercise the administration of the Territory." (Emphasis added).

545. The establishment of a *joint* Administering Authority for Nauru meant that there was a joint, or collective, responsibility for the performance of the obligations of the Administering Authority under the Trusteeship Agreement (*cf* H Lauterpacht, *Oppenheim's International Law* (London, 7th ed), Vol 1, p.208; H Kelsen, *The Law of the United Nations* (London, 1951), pp.601-9; Goodrich and Hambro, *Charter of the United Nations* (London, 1949), p.440; Nicolas Veicopoulous, *Traité des territoires dépendants* (Paris, 1960), Vol.1, p.144; Charles Rousseau, *Droit international public*, Vol.II (1977), p.404). Authority was conferred on the three States on the "basis of complete legal equality" (*cf ICJ Reports 1992*, p.326 (Judge Ago)).

546. Other provisions in the Trusteeship Agreement confirm that this responsibility was equal and collective. Thus, it was the *joint* Administering Authority which gave each of the undertakings mentioned in Articles 3, 5 and 6 of the Trusteeship Agreement, including undertakings to administer the Territory in accordance with Article 76 of the Charter; to co-operate with the Trusteeship Council; and to promote "the economic, social, educational and cultural advancement of the inhabitants". These undertakings were necessarily given jointly, as the Authority itself was joint. Thus, any breach of the Trusteeship Agreement, including these undertakings, would involve equal and

collective liability for Australia, New Zealand and the United Kingdom. In particular, if found responsible for breach of a duty to rehabilitate, Australia's liability would be equal and collective with the other two States. Australia could not, consistently with this, be liable for more than one third of the damage. Further, any such liability must be further reduced to take account of the acts and omissions of the United Nations, and also of Nauru. See Chapter 3 below.

547. Neither Article 4 of the Trusteeship Agreement nor the administrative arrangements made under it point to a contrary conclusion. For pursuant to that Article, the joint Administering Authority - Australia, New Zealand and the United Kingdom - accepted responsibility (jointly) for the "peace, order, good government and defence" of the Territory. It was on this basis that the United Nations approved the Trusteeship Agreement; and it was for this stated purpose that it was agreed by the three Governments that Australia would exercise legislative, administrative and jurisdictional power in the Territory "on behalf of the Administering Authority and except and until otherwise agreed" by the three Governments (Art.4). It is, as Judge Shahabuddeen noted, "difficult, therefore, to resist Australia's argument that, however extensive was its administrative authority over Nauru, that authority fell to be regarded in law as having been exercised by it on behalf of all three Governments" (*ICJ Reports 1992*, p.378).

Section III: The international community and Nauru regarded the three States as equally responsible for the territory

548. The international community of the day regarded the legal regime established by the 1947 Trusteeship Agreement as reflecting practical as well as legal reality. At the time of the Trusteeship, the international community held each of the three States equally responsible for the Territory. Thus, when the General Assembly or the Trusteeship Council made recommendations concerning Nauru, both addressed themselves to the *joint* Administering Authority, not to Australia alone. For example, in two most important resolutions - Trusteeship Council resolution 2149 (S-XIII) and General Assembly resolution 2347 (XXII) - the Trusteeship Council and the General Assembly resolved "in agreement with the Administering Authority" that the Nauruan Trusteeship Agreement should be brought to an end. There was no discrimination between the three constituents of that joint Authority.

549. The Trusteeship Council - charged by the Charter and the General Assembly with particular responsibility for supervision of the Territory's administration - clearly regarded the three States as responsible. For example, in

its 1949 Report the Council wrote:

> "The Council, recalling that although in accordance with article 4 of the Trusteeship Agreement the Government of Australia is entrusted with the administration of the Trust Territory, the Governments of the United Kingdom and New Zealand are also accountable to the United Nations under the terms of the Trusteeship Agreement, recommends that these Governments take such steps as may be appropriate to assist the Government of Australia in carrying out the recommendations of the Council." (United Nations, *Report of the Trusteeship Council, General Assembly Official Records, 4th Session*, Suppl. No.4 (A/933), p.76.)

550. The 1956 Trusteeship Council Report also recognized that:

> "Nauru is unique also in having more than one State as the Joint Administering Authority and in the special economic interest which the three Governments have in the Territory and which they exercise through the British Phosphate Commissioners designated by them." (United Nations, *Report of the Trusteeship Council, General Assembly Official Records, 11th Session*, Suppl. No.4 (A/3170), p.323.)

551. At the international level each of the three States held itself out as responsible for Nauru. Each took an active part in United Nations discussions concerning the Territory, particularly in the Fourth Committee and the Trusteeship Council (see eg Part I, Chapter 4). Indeed, New Zealand retained Trusteeship Council membership (until 1968) only on account of its part in the joint Authority for Nauru (Charter, Art.86(1)(a)).

552. Consistently with this, the Nauruans themselves have also claimed that the responsibility to rehabilitate was shared jointly by all three Governments. On 26 November 1967, Head Chief DeRoburt explained that:

> "[I]t was ... their contention that the three Governments should bear responsibility for the rehabilitation of land mined prior to 1 July 1987". (United Nations, *Trusteeship Council Official Records, 13th Special Session*, Doc.T/SR.1323; reproduced in Annex 29 to Preliminary Objections; *cf* Head Chief's Speech in *Trusteeship Council Official Records, 33rd Session*, Doc.T/SR,1285, p.91, set out in NM, para.186).

553. The Nauruan representatives adopted the same approach during the 1966-1967 discussions with the three Governments on independence and rehabilitation. Even more recently, in its notes of 20 May 1989 to the United Kingdom and New Zealand, Nauru maintained that both States "in the capacity as one of the three States involved in and party to the Mandate and Trusteeship over Nauru, was also responsible for the breaches of those Agreements and of general international law referred to in that Note" (Annex 80, Nos.29 and 30, Vol.4, NM). It was not until these proceedings that Nauru alleged that Australia should bear responsibility alone and meet the entire burden of any compensation by itself.

CHAPTER 3

THE LEGAL CONSEQUENCES OF SHARED RESPONSIBILITY

Section I: Equity would take account of the roles of the United Kingdom, New Zealand and the United Nations in deciding Australia's liability

554. In deciding questions of reparation, the Court has of course a large measure of discretion. The "jus aequum" always governs, however, in determining liability for damages. Thus, any liability which Australia might have incurred as a result of the supposed failure to rehabilitate would necessarily reflect the fact that the United Kingdom and New Zealand, as well as the United Nations, also contributed to the supposed injury. In these circumstances, Australia's liability, if any, would not be greater than its proportionate share of the damage (*cf* G Schwarzenberger, *International Law*, Vol.1 (3rd ed, 1957) p.669).

555. The Court has acknowledged the equitable and fact-dependent character of decisions regarding compensation. In the *Corfu Channel* case (*ICJ Reports 1949*, p.249) for example, the Court sought to make a fair and reasonable compensation, having regard to all the circumstances. International arbitral tribunals have adopted much the same approach. For example, in *Kuwait v Aminoil* ((1982) 66 ILR 519, at 581) the arbitral tribunal observed: ·

> "It is well known that any estimate in money terms of amounts intended to express the value of an asset, of an undertaking, of a contract, or of services rendered, must take equitable principles into account."

This applies with equal force to any estimate of the injury alleged in this case.

556. The tribunal's decision in *The Zaffiro* ((1925) 6 UNIRAA 160) shows the operation of equitable principles in circumstances such as these where there have been other participants besides the defendant State. The British-United States Arbitral Tribunal held the United States liable for the looting and destruction of the property of certain British nationals in Manila. This had been caused by the Chinese crew members of the Zaffiro, a US public vessel. The Tribunal found that they had been allowed ashore without effective control (6 UNIRAA, at 164-5). But besides the Zaffiro's crew, it was also shown that a number of other persons had participated in the looting. As a result, the

Tribunal, confirming the equitable and evidentiary character of its award, decided that:

> "In view, however, of our finding that a considerable, though unascertainable, part of the damage is not chargeable to the Chinese crew of the Zaffiro, we hold that interest on the claims should not be allowed" (at p165).

557. Since the arbitration was conducted twenty-seven years after the damage was caused, the interest was a substantial proportion of the amount claimed. In effect, the Tribunal did not require the United States to compensate for the totality of the damage because it would have been inequitable to have required it to do so.

558. Other arbitral decisions in which the defendant State was held liable only for a proportionate share of the loss, on account of other contributing factors, or because of other participants include *Yuille Shortridge and Co (Great Britain v Portugal*, 1861), *Lapradelle and Politis*, ii, 78; *Lacaze* (*France v Argentina*, 1864), *Lapradelle v Politis*, ii, 290; *British Claims in Spanish Morocco* (1925) 2 UNRIAA 615; and the *Martini* case (*Italy v Venezuela*) (1930) 2 UNRIAA 975. In *British Claims in Spanish Morocco*, Arbitrator Huber held Spain liable for only 25% of the injury in some areas, and 50% in others, depending on the extent to which injury resulted from other causes. In the *Martini* case, the Tribunal ordered Venezuela to pay only one third of the damage, holding that the rest had been caused by war.

559. One noted author has written that:

> "In the Venable Claim (1927), the Mexican United States General Claims Commission relied primarily on the *Lacaze* case (1864), between the Argentine and France for its finding that only the immediate and direct results of an illegal act are to be regarded as losses for purposes of reparation (4 RIAA, p.219, at p.225). In this Award, ... the proposition that losses should be limited to those which are the '*immediate* and direct consequence' of the illegal act is justified on grounds of reasonableness and equity (2 La Pradelle-Politis, p.290, at p.298). Similarly, in the *Portugo-German* Arbitration (1928), the Tribunal based its conclusion that a tortfeasor is responsible for intended damage irrespective of its direct or indirect character entirely on grounds of equity (2 RIAA, p.1011, at p.1031)." (Schwarzenberger, p.669, fn.89.)

Although it has not always been easy to assess the exact proportion to be borne by the defendant State, no tribunal has yet given up the task on account of its difficulty (*cf Metzger's case* (*Germany v Venezuela*) (1903) 10 UNRIAA 417.)

560. It would, therefore, be contrary to international practice to disregard the involvement of the United Kingdom and New Zealand, and of the United Nations (discussed below) in deciding the question of Australia's liability in this case. It would be quite inequitable to hold Australia liable for the totality of the damage to which the United Kingdom, New Zealand and the United Nations have clearly contributed. Practically speaking, it is, of course, virtually impossible to link specific items of damage to the acts of one Government (or Organisation) rather than another. However, bearing in mind the equal responsibility of the other two States for the Trust Territory and their respective shares in the phosphate industry, Australia contends that it would not be appropriate to require Australia to bear more than a proportionate share of the supposed injury said to have arisen from mining during the Trusteeship period; and any such liability should be further diminished to take account of the role of the United Nations (and also of Nauru). See Sections IV and V.

561. This approach is consistent with the preparatory work for the International Law Commission's draft Articles on State responsibility which has referred to a need for proportionality between any breach and its legal consequences (e.g., Special Rapporteur's Preliminary Reports, [1980] YBILC, Vol 2, Pt.1, p.127-8 (UN Doc.A/CN.4/330); [1981] YBILC, Vol 2, Pt.1, p.100 (UNDoc.A/CN.4/344)). The possibility that the conduct of other States might affect an award for damages has also been mentioned in preparatory work (eg, [1981] YBILC, Vol.II, Pt 1, UN Doc.A/CN.4/344, p.93, para.108, fn.69). Whilst the Commission has not completed its deliberations on the subject, it would apparently acknowledge that a principle of equity and reasonableness applies (*cf* Draft Report of the ILC at its 42nd Session, 13 July 1990, UN Doc.A/CN.4/L/450, pp.17, 29-31). The ILC's Drafting Committee has, moreover, also proposed the inclusion of a specific provision requiring that account be taken of the claimant's "negligence or ... wilful act or omission" (Article 6.2 bis of draft Articles on State responsibility: titles and texts of articles adopted by the Drafting Committee, at the ILC's 44th Session, 15 July 1992 (UN Doc.A/CN.4/L.472)).

Section II: There must be equitable apportionment in the absence of effective rights of contribution

562. Domestic systems acknowledge that situations involving collective responsibility give rise to the problem of apportioning liability. Each system apparently seeks to resolve the problem fairly. It is highly unlikely that any legal system would tolerate the possibility that a claimant might recover multiple awards in respect of the same damage from different defendants, with the result that the claimant received more than the damage actually suffered. It is improbable that international law would differ in this respect.

563. The means by which liability is distributed in situations of this kind varies from legal system to legal system. A domestic system can offer little useful guidance in this context. Each such system deals with the matter according to its own social, economic and legal history. As well there are many relevant structural differences between domestic and international systems (*cf Nicaragua* case, *ICJ Reports 1984*, pp.392, 431).

564. For example, in the courts of common law States, if an applicant brings an action for damages in contract or tort against one co-contractor or co-tortfeasor, the respondent may elect to join (compulsorily) the other co-contractors or co-tortfeasors so as to recover contribution from them in respect of any award of damages. A just apportionment can thus be made. Common law judges have recognized that this right has become the corollary of the common law regime of joint and several liability, pursuant to which one person alone can be required to meet a liability which has also been incurred by others. In those circumstances in which the common law regards a regime of joint and several liability as appropriate, justice is completed by the ready availability of an enforceable right of contribution. As Lord Templeman observed in *J H Rayner Ltd v Department of Trade* [1990] 2 AC 418, at p.480:

> "An international or a domestic law which imposed and enforced joint and several liability on ... sovereign states without imposing and enforcing contribution between those states would be devoid of logic and justice."

565. International law cannot enforce contribution, because international adjudication is fundamentally consensual. Were a regime of joint and several liability to apply in a situation of collective State responsibility, a defendant State would not be able to exercise an enforceable right to contribution against

those of its co-wrongdoers which did not consent to the Court's jurisdiction. Joint and several liability at international law would carry with it the consequence that one State (here, Australia) could well be required to bear the totality of the damage brought about by a number of States. Such a result cannot be regarded as conducive to the peaceful settlement of disputes by judicial or other friendly means.

566. Nauru would defy the very logic of international law and invite the Court to adopt a regime which works equitably in domestic common law systems, but would not do so at international law. International law calls for a different way of dealing with the problem of apportioning liability in a situation of collective responsibility. Australia contends that if it has incurred any liability, then principles of equitable apportionment are to be applied. These would take account of the joint responsibility of the United Kingdom and New Zealand, as well as the role of the United Nations. This solution is contemplated by the Court in its judgment of 26 June 1992 (*ICJ Reports 1992*, p.262, para.48; also p.290 (Judge Shahabuddeen)).

Section III: Joint and several liability is not a part of general international law

567. It follows from the foregoing that Australia contends that joint and several liability is not a part of international law. Nauru contends, however, that where a number of States concurrently cause damage, or damage is caused by one State acting on its own and others' behalf, each State is not only separately responsible for its own acts, but one State can be required to compensate for the totality of the damage, notwithstanding the responsibility of the other States (Nauru CR 91/20, pp.86-7; CR 91/22, p.46). According to Nauru, there is a presumption in international law of "passive solidarity" or "joint and several liability". This is the device used by Nauru to overcome the fact that two of the three States responsible are not subject to the Court's jurisdiction. In conformity with its already stated position, Australia denies that any such presumption exists. Australia contends that if such a legal regime can exist at international law, it does so only by virtue of specific agreement. The 1947 Trusteeship Agreement shows that no such agreement was reached in relation to Nauru.

568. Australia's contention in this regard is entirely consistent with the attitude of States in concluding the 1972 Convention on International Liability for Damage by Space Objects (961 UNTS 187). The Convention established joint and several liability as a *special* regime for the *unprecedented* risks created by

State activities in outer space (Art.V, discussed in Australia's Preliminary Objections, pp.124-5, paras.299-302). But the record of the debates leading to the conclusion of the Convention clearly shows that States considered that to be a departure from customary international law. The delegates were conscious of breaking new ground and of adopting an exceptional regime as a practical solution for a novel subject - hazardous activities in outer space. The debates emphasize that States did not consider that a principle of joint and several liability (or passive solidarity) was part of general international law (Australia's Preliminary Objections, paras.300-302).

569. Nor do the decisions of this Court support Nauru's contention that, notwithstanding the joint involvement of the United Kingdom and New Zealand, Australia is liable for the totality of the damage. Nauru relies on the *Corfu Channel* case *(ICJ Reports 1949*, p.9), but that case concerned only the responsibility of Albania for failure to warn of the possibility of mines. It was not a case in which another State shared joint responsibility, nor was it suggested that Albania acted, or failed to act, at the behest of another State. Nauru cannot make good its contention in this regard simply by showing that, in some cases, liability for the whole damage has attached to one State, notwithstanding the possible involvement of others. Further, in the *Nicaragua* case, the Court specifically said that although the United States was responsible for its own unlawful acts, it was *not* responsible for the acts of the *contras* (*ICJ Reports 1986*, p.65) although the Court had determined that the United States assistance to the contras had been "crucial to the pursuit of their activities" (ie p.62).

570. Instead, the practice of this Court and of international arbitral tribunals emphasizes the equitable character of decisions concerning compensation. See Section I above. It does not provide any evidence for a presumption of joint and several liability, or passive solidarity.

571. Further, although the International Law Commission has not yet given detailed consideration to the consequences of collective responsibility, it has indicated that it is disinclined to accept the application of joint and several liability (or passive solidarity), even in relation to the injurious consequences of acts not prohibited by international law - where solidary responsibility might have been thought particularly appropriate (*cf* Report of the ILC on 42nd Session, UN Doc.A/45/10, para.517). In relation to States which participate in the unlawful act of another, Article 27 of the ILC's draft Articles on State responsibility does no more than affirm the well-established principle that each

State is responsible for its own acts - and only those acts. But the consequences of that principle point away from a regime in which one State can be held liable for the totality of damage (although also caused by other States) to an equitable apportionment of damages, having regard to the number of States involved (*cf* Quigley, "Complicity in International Law" (1986) LVII *British Yearbook of International Law* 77, at p.128).

572. There is little evidence that jurists consider the principle of joint and several liability to be part of general international law (*Cf* I Brownlie, *Principles of Public International Law* (3rd ed 1983) p.456 and (4th ed 1990) p.456). There is, however, support for a principle which permits a proportionate reduction of damages to take account of the role of concurrent wrong-doers:

> "Il n'y a pas place en droit international pour une théorie du grief global qui permettrait d'écarter la ventilation du dommage en cas d'intervention de plusieurs causes" (Brigitte Bollecker-Stern, *Le préjudice dans la théorie de la responsabilité internationale* (1973) p.292.)

Section IV: If Australia were to bear any liability at all, it would be lessened by the failure of the United Nations to exercise adequate supervisory authority

573. The failure, if failure there was, to provide for rehabilitation was as much the failure of the United Nations, as of the Administering Authority; and the resulting liability, if any, of Australia would be correspondingly less.

574. Chapters XII and XIII of the Charter dealt with the position of the United Nations in relation to trusteeship territories. Under Article 75, the primary duty of the United Nations was "to establish under its authority an international trusteeship system for the administration and supervision of ... territories" which like Nauru came under the system by agreement. The Charter gave the United Nations primary authority and responsibility for the trusteeship system and for ensuring that it met the "basic objectives" set out in Article 76. There was nothing in Chapter XII of the Charter to indicate that, once an Administering Authority had been appointed in accordance with Article 81, the authority and responsibility of the United Nations ended, or diminished. On the contrary, under the Charter the Administering Authority remained in each case subject to the General Assembly and the Trusteeship Council. See especially Articles 75, 81, 85, 87, 88; *cf* Judgment of 26 June 1992, *ICJ Reports 1992*, p.304 (Judge Oda).

575. Charter Articles 85, 87 and 88 were intended to ensure that the United Nations, acting principally through the General Assembly and the Trusteeship Council, was able to discharge its responsibilities on a well-informed basis. The General Assembly and, under its authority, the Trusteeship Council were empowered to entertain petitions from, and provide for periodic visits to trust territories; to consider reports from administering authorities and "take ... other actions in conformity with the terms of the Trusteeship Agreement" (Art.87). The Trusteeship Council was required to submit a questionnaire to each Administering Authority and each Administering Authority was required to make an annual report to the General Assembly on the basis of that questionnaire (Art.88).

576. In the case of Nauru, the Administering Authority made detailed reports to the United Nations annually. The reports dealt fully with the economic, political and social situation in the Territory and were considered by the Trusteeship Council each year. There were also Visiting Missions at three yearly intervals throughout the Trusteeship. They too reported at first-hand on the Nauruan situation. See eg, Part I, Chapter 2 above.

577. There was, moreover, direct Nauruan participation in the work of the Trusteeship Council from 1961 until the end of the Trusteeship. From 1961 onwards, a Nauruan adviser was appointed to the delegation of the Special Representative of the Administering Authority during the Trusteeship Council's annual consideration of the Administering Authority's report. That adviser was there to inform Council members (para.63 above).

578. The Charter made it clear that the administrative powers conferred on the joint Authority under the 1947 Trusteeship Agreement were always intended to be subject to the United Nations. In keeping with this, the United Nations was kept fully informed of developments in the Territory. When the United Nations terminated the Trusteeship in December 1967, it purported to discharge the Administering Authority from its trusteeship obligations on the basis of a well-informed confidence that the Authority had fulfilled its undertakings. It has not been suggested until now that the United Nations in fact failed to discharge its supervisory function and failed to ensure that the Authority had safeguarded the interests of Nauruans (*Cf ICJ Reports 1992*, p.305 (Judge Oda)).

579. But if, as Nauru alleges, there was a failure to make adequate provision for rehabilitation, that failure was as much, if not more, attributable to the United Nations under whose aegis the Administering Authority acted, as to the

Authority itself. A finding in favour of Nauru would be tantamount to a finding that the United Nations failed to discharge adequately its own obligations under the Charter. Worse still, if Nauru's claims are upheld, the United Nations would have closed its eyes to very serious breaches of international law, involving self-determination and principles of *jus cogens*. It is virtually inconceivable that such breaches could have been permitted by the United Nations had it supervised the Territory's administration properly. If, however, Nauru's claim were upheld, then plainly the failure on the United Nations' part would have contributed in large part to Nauru's supposed injury. As already foreshadowed, Australia contends that equity would require that this too be borne in mind in deciding Australia's liability. Australia could not, consistently with equitable principles, be held liable for that proportion of the damage which in such a case would rightly rest with the United Nations.

Section V: Australia's liability, if any, would be diminished by Nauru's conduct

580. If Nauru's conduct does not disqualify it from relief (Chapter 1 of this Part), it does, at least, diminish Australia's liability, if any, for non-rehabilitation. There are three reasons for this. First, it was the Nauruans themselves who gave priority to resettlement, rather than rehabilitation, prior to 1965. And even after that date, in the context of the discussions leading to the Canberra Agreement in 1967, the Nauruans noted that rehabilitation was not an issue that need concern the United Nations, and at no stage asked that specific funds be set aside for rehabilitation. Had they done so, and had the funds so earmarked been patently insufficient, it would have been possible for the United Nations to have taken a more critical view of the adequacy of the Canberra financial settlement. Secondly, if Australia has been guilty of failure to rehabilitate, then so too has Nauru. See Chapter 1 of this Part. According to international practice (discussed below), this fact would alleviate any liability Australia might bear. Thirdly, Nauru has not sought to pursue its claim with all due diligence.

581. The facts relating to the prosecution by Nauru of its claim are set out in the Court's judgment of 26 June 1992 (*ICJ Reports 1992*, pp.254-5, paras.33-36). As the Court noted, Nauru was officially informed of Australia's position on the subject of rehabilitation, at the latest, by letter dated 4 February 1969. In that letter, the Australian Minister for External Affairs informed the Nauruan President that Australia, together with the United Kingdom and New Zealand, denied responsibility for rehabilitation and "remain[ed] convinced

that the [1967] terms of settlement ... were sufficiently generous to enable [Nauru] to meet its needs for rehabilitation and development" (Annex 77, Vol.4, NM). It was not until December 1988 that Nauru, by notes of 20 December 1988 to the three Governments, stated its claim that Australia as well as the United Kingdom and New Zealand were legally responsible for land mined out before 1 July 1967 (Annex 80, Nos.22, 23 and 24, Vol.4, NM). These proceedings were not, of course, issued until May 1989, at least twenty years after Nauru became aware of Australia's position.

582. There have been a number of cases in which international arbitral tribunals have held that if the claimant's conduct is of this kind, the liability of the respondent will be correspondingly diminished. In the *Delagoa Bay Railway* case (*United States and Great Britain v Portugal*), the tribunal held that the act of the Portuguese Government - in unilaterally fixing a time limit of eight months for building a portion of the railway - was illegal in form but not in substance, since the eight months' limit was a reasonable one. The tribunal also found, however, that there were other extenuating circumstances, in that the company, when asked by the Portuguese Government to state the length of time which it required to complete the railroad, had remained silent and had thereafter made no objection when informed of the time fixed by the Government for completion. The tribunal considered that these circumstances "alleviated" the Government's liability, and warranted "a reduction of the amount" allowable to the company by way of compensation (quoted in Whiteman, *Damages in International Law*, Washington, 1937, Vol.I, pp.206-7; reported in La Fontaine, *Pasicrisie internationale*, Bern, 1902, p.402). In the *Davis* case (9 UNRIAA 460, at 463) the claim of a claimant consignor whose goods had been delivered to the wrong person by Venezuelan customs officers was completely defeated by the claimant's failure to inform the Venezuelan Government promptly of the error. A similar principle was applied in the *Naulilaa* case (2 UNIAA 1076) where the tribunal held Germany's liability was diminished by the dilatory conduct of the Portuguese Government.

583. In this case, Nauru has delayed too long in bringing its rehabilitation claim and in beginning a practicable rehabilitation program. Australia's liability, if any, is therefore to be reduced accordingly.

584. In any event, as the Court notes (*ICJ Reports 1992*, para.36), Australia cannot be liable to bear any costs resulting from Nauru's delay. Thus, if Australia is liable to meet any of the cost of rehabilitation, that cost must be assessed as at 1 July 1967, and not as at today's costs. For Nauru took over the

phosphate industry and responsibility for its management on 1 July 1967 and, if there has been any wrongdoing on Australia's part, it was completed on that date.

585. The practice of this Court and of international arbitral tribunals confirms that 1 July 1967 is the relevant date for the assessment of Australia's liability, if any there be. See, for example, *Corfu Channel (Compensation)* case, *ICJ Reports 1949*, p.249; *Rhodope Forests (Greece v Bulgaria)*, 3 UNRIAA 1389 and *US-German Mixed Claims Commission of 1922*, 7 UNRIAA13; and other cases cited in Gray, *Judicial Remedies in International Law* (Oxford, 1987), at p.80. Thus, in the *Rhodope Forests* case, the value of the forest was calculated as at the date of dispossession.

586. This case is quite different from the *Chorzow Factory* case (*PCIJ, Ser 4, No.13*, p.46) in which the date of judgment was chosen as the date for assessment, on the basis that the value of the expropriated factory would have appreciated in the hands of the claimant during the intervening years. This cannot be compared with the situation arising in the present case where Australia's default, if any, was completed by 1 July 1967.

587. Finally, it goes almost without saying that Nauru cannot recover the cost of doing the work of rehabilitation unless it can establish that this really constitutes its loss, and that it will apply any compensation which might be awarded in its favour to carrying out a practicable rehabilitation program.

588. As Chapter 1 of this Part has shown, Nauru itself has not at any stage in the past quarter century begun such a program, even in respect of the lands mined after 1 July 1967. Nor has it, during the past twenty-five years, developed a viable rehabilitation program. On the contrary, since independence it has continued to mine much as the BPC did in earlier years, and even the 1987 Commission of Inquiry felt obliged to say that rehabilitation might well fail because of a lack of real motivation on the part of the Nauruans (para.516 above). In these circumstances, there must be a degree of doubt as to whether a feasible rehabilitation program really can be developed and if so, whether Nauru would in fact apply any award which it might receive in this case to implementing such a program. Nauru should be required by the Court to show that there in fact exists a viable plan for rehabilitation which can be implemented by Nauru with the expertise available to it.

589. Further, at least one other conclusion of the 1987 Commission of Inquiry should also be borne in mind - that a rehabilitation program, if it was to work at

all, would need to cover all the mined-out lands. As the Commission said:

> "The land mined during the period 1906 to 1968 is physically indistinguishable from the land mined subsequently. The practicalities of rehabilitation, especially when rehabilitation is designed to comply with the requirements of a planned future land use, would prohibit a specific portion of the total mined-out land, i.e. the land mined prior to 1968, being rehabilitated separately from the remaining mined land." (p.1141)

It added that:

> "unless the Nauruan community and its Government have a full commitment to achieve the objectives themselves, unless they are prepared to undertake the work themselves - irrespective of what the work is - unless they are prepared to make the effort to train themselves to acquire the skills, whether manual or professional, that will be needed to enable them to eventually operate, manage and improve the various activities, industries and businesses, then the project will fail by default." (at pp.1165-6)

590. As proof of Nauru's serious intent and the practicability of any rehabilitation program, Nauru should also be required by the Court to set aside a sum which would enable it to rehabilitate the lands which it admits are its responsibility - the lands mined out after 1 July 1967. This must be a condition of any award that might be made in Nauru's favour.

591. And reparation payable by Australia would be payable as and when the actual costs of any particular rehabilitation project, being completed, fell to be met. These costs would have to be limited to rehabilitation *stricto sensu*, ie restoration of the land to its former state, and not the costs of new development projects, such as airfields or housing, undertaken on the site of the lands to be rehabilitated.

592. The payment by Australia would be also limited to that proportion of the cost which the Court determines to be attributable to Australia, bearing in mind the responsibility of Nauru, of the other two Partner Governments, and of the United Nations.

Section VI: Summation

593. For the reasons set out in Part II of this Counter-Memorial, Australia does not accept responsibility for rehabilitating lands mined out prior to 1 July 1967. In any event, because Nauru has failed to take any steps whatsoever towards rehabilitating the lands which it has mined out itself, Nauru is disqualified from the relief it now seeks. And if not so disqualified, Australia would still not be liable to meet the whole of the damage. For the reasons set out earlier, Australia's responsibility for the Trusteeship was co-equal and collective with the United Kingdom and New Zealand; and all three Governments shared the beneficial ownership of the phosphate industry. Accordingly, on the facts referred to in Chapter 2 of this Part, Australia could not be liable for any more than one third of the damage in respect of the land mined out during the Trusteeship. But any such liability would be reduced on account of the involvement of the United Nations in the supposed breach. As explained, such involvement is a necessary corollary of any finding of breach on Australia's part. Finally, Australia's liability, if any, would be further diminished on account of Nauru's failure to pursue its claim against Australia with due diligence, or to begin its own program of rehabilitation in respect of those lands which it has mined itself during the past quarter century.

SUBMISSIONS

1. The Government of Australia requests the Court to adjudge and declare that:

> on the basis of the facts and law presented in this Counter-Memorial, Australia is not in breach of any obligation relating to rehabilitation of phosphate lands on Nauru worked out prior to July 1967.

2. If the Court declines to accept Australia's primary submission and finds that Australia is in breach of a legal obligation, then the Government of Australia requests the Court to adjudge and declare that:

(a) Australia is not solely responsible for the damage, if any, to which such breach may have contributed, nor liable for the whole of the damage; and

(b) any Australian liability arises only in relation to actual work done in rehabilitation *stricto sensu* and in the amount which reflects Australia's due proportion of responsibility.

GAVAN GRIFFITH
Agent of the Government of Australia

HENRY BURMESTER
Co-Agent of the Government of Australia

WARWICK WEEMAES
Co-Agent of the Government of Australia

29 March 1993

LIST OF ANNEXES[1]

Annex 1. Centre for International Economics, *Estimating the 1967 Value of Nauru's Phosphate Mine.*

Annex 2. Information paper on possible sale of the BPC's assets (Department of Territories).

Annex 3. Minute on royalty rates in New South Wales (Department of Territories).

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[1] Not reproduced. *[Note by the Registry.]*

PLAIDOIRIES RELATIVES AUX EXCEPTIONS PRÉLIMINAIRES

PROCÈS-VERBAUX DES AUDIENCES PUBLIQUES

tenues au Palais de la Paix, à La Haye, du 11 au 22 novembre 1991
et le 26 juin 1992, sous la présidence de sir Robert Jennings, président

ORAL ARGUMENTS ON THE PRELIMINARY OBJECTIONS

MINUTES OF THE PUBLIC SITTINGS

held at the Peace Palace, The Hague, from 11 to 22 November 1991
and on 26 June 1992, President Sir Robert Jennings presiding

CR 91/15

FIRST PUBLIC SITTING (11 XI 91, 10 a.m.)

Present: *President* Sir Robert JENNINGS; *Vice-President* ODA; *Judges* LACHS, AGO, SCHWEBEL, BEDJAOUI, NI, EVENSEN, TARASSOV, GUILLAUME, SHAHABUDDEEN, AGUILAR MAWDSLEY, RANJEVA; *Registrar* VALENCIA-OSPINA.

Also present:

For the Government of the Republic of Nauru:

Mr. V. S. Mani, Professor of International Law, Jawaharlal Nehru University, New Delhi; former Chief Secretary and Secretary to Cabinet, Republic of Nauru; and Member of the Bar, New Delhi,

Mr. Leo D. Keke, Presidential Counsel of the Republic of Nauru; former Minister for Justice of the Republic of Nauru; and Member of the Bar of the Republic of Nauru and of the Australian Bar, *as Co-Agents, Counsel and Advocates*;

H.E. Hammer DeRoburt, G.C.M.G., O.B.E., M.P., Head Chief and Chairman of the Nauru Local Government Council; former President and Chairman of Cabinet and former Minister for External and Internal Affairs and the Phosphate Industry, Republic of Nauru,

Mr. Ian Brownlie, Member of the English Bar; Q.C., F.B.A., Chichele Professor of Public International Law, Oxford; Fellow of All Souls College, Oxford,

Mr. Barry Connell, Associate Professor of Law, Monash University, Melbourne; Member of the Australian Bar; former Chief Secretary and Secretary to Cabinet, Republic of Nauru,

Mr. James Crawford, Challis Professor of International Law and Dean of the Faculty of Law, University of Sydney; Member of the Australian Bar, *as Counsel and Advocates*.

For the Government of Australia:

Dr. Gavan Griffith, Q.C., Solicitor-General of Australia, *as Agent and Counsel*;

H.E. Mr. Warwick Weemaes, Ambassador of Australia, *as Co-Agent*;

Mr. Henry Burmester, Principal Adviser in International Law, Australian Attorney-General's Department, *as Co-Agent and Counsel*;

Professor Eduardo Jiménez de Aréchaga, Professor of International Law at Montevideo,

Professor Derek W. Bowett, Q.C., formerly Whewell Professor of International Law at the University of Cambridge,

Professor Alain Pellet, Professor of Law at the University of Paris X-Nanterre and at the Institute of Political Studies, Paris,

Dr. Susan Kenny, of the Australian Bar, *as Counsel*;

Mr. Peter Shannon, Deputy Legal Adviser, Australian Department of Foreign Affairs and Trade,

Mr. Paul Porteous, First Secretary, Australian Embassy, The Hague, *as Advisers*.

OPENING OF THE ORAL PROCEEDINGS

The PRESIDENT: The Court sits today in its composition for the proceedings instituted by the Republic of Nauru against the Commonwealth of Australia for the settlement of a dispute concerning *Certain Phosphate Lands in Nauru*. The bench does not include a judge possessing the nationality of either of the two Parties but neither Nauru nor Australia has availed itself of its consequent right, under Article 31 of the Court's Statute, to choose a person to sit as judge *ad hoc*.

One Member of the Court, Judge Weeramantry, has explained to me that he was Chairman of a Commission of Inquiry which reported on matters which may be pertinent in this case and that in accordance with Article 17 of the Court's Statute he will therefore take no part in this case.

Sadly I must also record the loss of Judge Taslim Olawale Elias, who died in office on 14 August after more than 16 years on the bench. His passing is for his friends and colleagues the source of great sorrow, and the loss to the Court is great. Before we proceed to the business for which the Court is assembled, it is fitting that I should pay tribute to Taslim Elias and to what he contributed to the international bench, and to the development and understanding of international law within his own country and continent as well as in the United Nations.

The name of Taslim Elias will in his own country remain indelibly associated with the consolidation of legal studies and with the firm inculcation of the meaning and importance of international law. It will in particular be honoured for many years to come by the alumni of the law school that has been given his name. He served Nigeria for 15 years as, successively, Attorney-General, Minister of Justice and Chief Justice of the Supreme Court. He contributed much also to the modern legal profile of the continent of Africa, especially in the Organization of African Unity, whose constitution bears his stamp, and in the Asian-African Legal Consultative Committee. On the broader international front, Taslim Elias came to be regarded, with reason, as a bulwark of the International Law Commission: and the significance of his powerful and positive influence at the Vienna Conference on the Law of Treaties has become a legend.

His career on this bench was no less remarkable. In 1980, already the Vice-President, he found himself suddenly at the helm of the Court owing to the death in office of President Sir Humphrey Waldock. Such was the esteem in which Taslim Elias was held that his colleagues very soon elected him their President. He thus became the first African jurist to accede to this office. During the three years of his Presidency he defended the interests of the Court with vigour and success for in him the erudition of a distinguished jurist and masterly writer was sustained by a force of character of which integrity and courage were the keynotes.

His courage was manifest in the heroic determination with which, day after day, he struggled against physical ailments of his later years and insisted on continuing to take a full part in the work of the Court. We are all, his friends and colleagues, conscious of the passing not only of an outstanding judge and jurist, but also of a lovable colleague and friend.

I ask all those present to stand for one minute in order to pay silent tribute to the memory of Judge Taslim Olawale Elias.

Please be seated. I should now say that the vacancy to the composition of the Court left by the death of Judge Elias is shortly to be filled by an election of the United Nations in accordance with the Statute of the Court. The person elected will not, of course, be able to take any part in the present proceedings on preliminary objections in this case.

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The Court has before it today the representatives of two Parties to the Statute of the Court, the Republic of Nauru and the Commonwealth of Australia. Australia is a party to the Statute by virtue of its membership of the United Nations. Nauru is not a Member of the United Nations but, through the fulfilment of the conditions laid down in Article 93, paragraph 2, of the Charter, and General Assembly resolutions 91 (I) and 42/21, became a Member to the Statute on 29 January 1988.

On 19 May 1989 the Government of the Republic of Nauru filed in the Registry of the Court an Application instituting proceedings against the Commonwealth of Australia, whose Government, before Nauru became independent as a Republic on 31 January 1968, had been acting as the administrator of that island under a United Nations Trusteeship Agreement.

In its Application, the Government of Nauru maintained that certain phosphate lands worked-out by mining during the period of Australian administration should have been rehabilitated in order to provide for the long-term needs of the population after independence. It alleged that Australia nevertheless failed to make due provision for this rehabilitation.

Nauru claimed, among other things, that, through this alleged failure, Australia was in breach of certain obligations accepted under the trusteeship system of the United Nations or owed to Nauru under general international law.

Accordingly, Nauru requested the Court to adjudge and declare that Australia had incurred international legal responsibility and was bound to make restitution or other appropriate reparation to Nauru for the damage and prejudice suffered.

In order to found the jurisdiction of the Court in the case, the Government of Nauru made, in its Application, the following statement:

> "Both the Republic of Nauru and the Commonwealth of Australia have accepted the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute, without any relevant reservation."

That Application having been communicated to the Australian Government, and the Parties' views on the procedure ascertained, the Court, on 18 July 1989, made an Order fixing 20 April 1990 and 21 January 1991 as the respective time-limits for a Memorial and a Counter-Memorial.

The Memorial was filed within the time-limit and, in its submissions, further particularized Nauru's claim. However, in a letter addressed to the Court on 19 September 1990 the Australian Government, after stating its view that the Court had no jurisdiction in the case and that the Application was not admissible, made known its intention to file preliminary objections in accordance with Article 79 of the Rules of Court.

Australia's objections were filed on 16 January 1991, that is to say, within the time-limit fixed for the Counter-Memorial, as required by the Rule. It will be appropriate for me to leave to the Agent of Australia the statement of the grounds of his Government's objections, the written presentation of which concludes with the following submission:

> "On the basis of the facts and law presented in the Preliminary Objections, the Government of Australia requests the Court to adjudge and declare that the Application by Nauru is inadmissible and that the Court lacks jurisdiction to hear the claims made by Nauru for all or any of the reasons set out in these Preliminary Objections."

The immediate procedure to be followed upon the filing of any preliminary objection is governed by the third paragraph of Article 79 of the Rules of Court, which provides for the proceedings on the merits of the case in question to be suspended and a time-limit to be fixed for the presentation by the other Party of a written statement of its observations and submissions. In an Order made on 8 February 1991 the Court fixed the required time-limit at 19 July 1991, and Nauru's statement was duly filed on 17 July. The Government of Nauru, in its written submissions,

> "requests the Court to reject the preliminary objections of Australia, and to adjudge and declare:
>
> (*a*) that the Court has jurisdiction in respect of the claim presented in the Memorial of Nauru, and
>
> (*b*) that the claim is admissible".

The Court has now, in accordance with the further provisions of Article 79, to hear the Parties' oral arguments with respect to its jurisdiction in the case and the admissibility of the Application.

I note the presence in the Court of the Agent of the Republic of Nauru, Mr. V. S. Mani, and the Agent of the Commonwealth of Australia, Mr. Gavan Griffith. At the present hearing, it will be for the Agent of Australia to address the Court first. Before I call upon him, however, I should announce that, after ascertaining the views of the Parties, the Court has decided, in accordance with Article 53, paragraph 2, of the Rules of Court, to make the pleadings and annexed documents hitherto filed in the case accessible to the public.

I now call upon Mr. Griffith.

ARGUMENT OF MR. GRIFFITH

AGENT FOR THE GOVERNMENT OF AUSTRALIA

Mr. GRIFFITH: As the Court pleases, Mr. President, Members of the Court. If we may say at the outset, that Australia's position is that it did not administer the trust territory. The administration, in our submission, was by an authority comprised of United Kingdom, Australia and New Zealand and, when we refer to the Administering Authority we refer to the administration of those three States.

This is a claim brought against Australia by Nauru which Australia feels bound to oppose — at this stage on grounds of admissibility and jurisdiction. Australia's opposition to this claim is not based on antagonism towards Nauru, and certainly not on a wish to deny the competence of this Court as a matter of principle.

We in Australia, have entertained, over many years, a feeling of warm friendship and respect for the people of Nauru and have no doubt that, whatever the outcome of this case, these feelings will continue. Nevertheless, we are bound to say that we see no basis for this new and rather unexpected claim. It was (and it remains) the belief of the Australian Government that Australia had dealt fairly with the Nauruan people. Certainly, that also was the view of the Governments of the United Kingdom and New Zealand, which, as I mentioned, shared with Australia the obligations of administration. And, we believe, this also was the view of the United Nations. When the three Administering Governments were discharged from their responsibilities under the Trusteeship Agreement, by the United Nations, that discharge was given against a background of appreciation for the efforts made by the Administering Authority to bring Nauru to independence. The record of the United Nations is absolutely clear on this.

So the Court will understand that it is with some feelings of dismay and disappointment that we now face these unexpected claims by Nauru.

As regards the Court, Australia's objection to its jurisdiction of course does not stem from any antipathy towards, or distrust of, the Court. On the contrary, Australia has always held the Court in the highest possible esteem.

Since it first accepted the compulsory jurisdiction of the Permanent Court in 1930, Australia has maintained and accepted jurisdiction under the optional clause. Its current Declaration of Acceptance dated 1975 does not contain any limitation as to time or subject-matter. Indeed, the Declaration of Acceptance contains very few limitations on jurisdiction. Australia contends, however, that one of those few limitations is relevant to this case.

It goes almost without saying that a broad acceptance of jurisdiction can give rise to its own difficulties. A State, we say, should not be exposed to suits which do not have any real foundation. The preliminary objection procedure of the Court, of course, affords a measure of practical protection and we rely upon that procedure in this case. That procedure falls within the framework of what is provided for in the Statute.

Australia submits that Nauru cannot show that the Court has jurisdiction over the claims made by it in this case. Nor, we say, can Nauru show that its claims are admissible against Australia. For this reason, our application is for the Court to decline to proceed further.

PRELIMINARY OBJECTIONS

Mr. President, Members of the Court, Nauru argues that Australia's preliminary objections should not be determined at this stage and should be joined to the merits. It says that Australia's objections are not essentially preliminary. For this reason, I refer first to the Court's Rules on this matter. We emphasize at the outset that it is for Nauru as applicant to establish to the Court's satisfaction that the Court has jurisdiction and that the claim is admissible against Australia. Australia contends that Nauru cannot meet this burden.

The procedure is controlled by Article 79 of the Rules of Court. Under paragraph 7 of Article 79, the Court may uphold an objection, reject it, or declare that in the circumstances of the case, the objection does not possess an exclusively preliminary character. It follows that, unless it determines that none of Australia's objections have an exclusively preliminary character under Article 79, we submit that the Court must consider and determine Australia's objections. Under the Rules as they now stand, there is no longer a residual discretion to defer consideration of preliminary objections by joining them to the merits.

The history of Article 79 discloses that its principal purpose is to ensure the fair, but efficient, determination of objections of this kind. Article 79 corresponds with Article 67 of the 1972 Rules which in turn was a revision, as the Court is aware, of Article 62 of the 1946 Rules.

The Court will also recall that the Sixth Committee of the General Assembly had been critical of the Court's previous practice of dealing with preliminary objections. In particular, we remind the Court that the Sixth Committee repeatedly disapproved of the practice of joining preliminary objections to the merits. Thus, in 1970, the Sixth Committee had stated in its Report that:

> "In particular, the view was expressed that it would be useful for the Court to decide expeditiously on all questions relating to jurisdiction and other preliminary issues which might be raised by the parties. The practice of reserving decisions on such questions pending consideration of the merits of the case had many drawbacks and had been sharply criticized in connection with the *South West Africa* cases and the *Barcelona Traction* case." (Report of the Sixth Committee, *UNGA* (25th Session, December 1970), United Nations doc. A/8238, p. 19.)

The following year, 1971, the Report of the Sixth Committee repeated:

> "Mention was also made of a suggestion that the Court should be encouraged to take a decision on preliminary objections as quickly as possible and to refrain from joining them to the merits unless it was strictly essential." (Report of the Sixth Committee, *UNGA* (26th Session, December 1971), United Nations doc. A/8568, p. 21.)

Reference to the *South West Africa* cases and to the *Barcelona Traction* case, mentioned in the Sixth Committee Report, recalls the fact that in these two cases the Applicant eventually failed on grounds first raised several years before as preliminary objections. By declining to determine them when they were first made, the Court and the parties were involved in avoidable delay, expense and argument.

The Rules relating to preliminary objections were revised in 1972 to solve this problem. A number of changes were made. Paragraph 5 of Article 62 of the 1946 Rules had specifically provided that: "After hearing the parties the Court shall give its decision on the objection or shall join the objection to the merits."

The 1972 revision deliberately deleted this express authorization to defer decisions on preliminary objections to the merit stage. Paragraph 7 of Article 67 of the 1972 Rules (which corresponds of course to paragraph 7 of Article 79 of the present Rules) was added. It stated in part:

> "After hearing the parties, the Court shall give its decision in the form of a judgment, by which it shall either uphold the objection, reject it, or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character. If the Court rejects the objection or declares that it does not possess an exclusively preliminary character, it shall fix time-limits for further proceedings."

The addition of paragraph 6, now to be found in paragraph 6 of Article 79, gave further encouragement to determine preliminary objections before going to the merits. It provided:

> "In order to enable the Court to determine its jurisdiction at the preliminary stage of the proceedings, the Court, whenever necessary, may request the parties to argue all questions of law and fact, and to adduce all evidence, which bear on the issue."

Thus the new Rule directed the Court to determine all questions of law and fact relating to jurisdiction and to call for relevant evidence. It did not matter that a question of law or fact might incidentally touch the merits.

So the current form of the Rules is the outcome of a more direct approach to the determination of preliminary objections. Before the revision, the Court had felt practically compelled to defer determination of a preliminary objection where it in some way raised the matter of law or fact bearing on the merits. This was said, in the *Barcelona Traction* case, to be in the interests of "the good administration of justice" (*I.C.J. Reports 1964*, p. 43). But the revised Rules offered a different solution. Hence, one authoritative writer has stated:

> "In the presence of such an objection, the Court, instead of bringing in the whole of the merits by means of a joinder, would, according to paragraph 6, request the parties to argue at the preliminary stage those questions, even touching upon the merits, which bear on the jurisdictional issue. Thus, there would no longer be justification for leaving in suspense or for postponing a decision of the Court's own jurisdiction." (E. Jiménez de Aréchaga, "The Amendments to the Rules of Procedure of the International Court of Justice", (1973) 67 *AJIL*, p. 1, at p. 11. See also G. Guyomar, *Commentaire du Règlement de la Cour internationale de Justice — Interprétation et pratique*, p. 371 (1972).)

Article 61, also introduced after the 1972 revision, enables the Court to act similarly in relation to objections as to admissibility and other matters. (Article 61 substantially reproduces Article 57 of the 1972 Rules.) Thus, if the Court thought it appropriate, it might request the parties to plead aspects of the case which it thought relevant to the preliminary objections, even though also relevant to the merits.

Australia submits to the Court today that, in this case, Article 79 *requires* the Court to consider and determine its objections at this preliminary stage. This is in the interests of the fair administration of justice. (Cf. *Appeal Relating to the Jurisdiction of the ICAO Council, I.C.J. Reports 1972*, p. 56.) Hence, before hearing the merits, the Court *must* satisfy itself of its jurisdiction and of the admissibility of the claim. We say Nauru's argument on this point fails to recognize this clear operation of the terms of Article 79.

REJECTION OF NAURU'S ARGUMENT

We turn now to Nauru's argument. Nauru in its Written Statement has divided Australia's objections into two classes: those relating to jurisdiction and those relating to admissibility. It is true that it is a logical order for objections to jurisdiction to precede objections to admissibility. However, Australia submits that this matter of characterization is largely beside the point. Our basic proposition is that the Court should not proceed to the merits *if* there is lack of jurisdiction *or* if the claim is inadmissible.

Nauru, in its Written Statement, gives a narrow definition of jurisdiction. It singles out as "jurisdictional" only one of Australia's objections — that based on the reservation to its acceptance of the Court's jurisdiction. And it does not concede that even this clear jurisdictional objection should be determined now (see paragraph 114 of Nauru's Written Statement). Our answer to this is that Article 79 requires determination of the jurisdictional objection.

Nauru states that the rest of Australia's objections are objections to admissibility. That is, they raise issues as to whether the Court should in fact exercise its jurisdiction in this case. Nauru contends that each of these matters should be left to the merits. In essence, Nauru's submission needs the support of the old paragraph 5 of Article 62 of the 1946 Rules. Of course our response is that such deferment would be contrary to the terms of Article 79. Our submission is that each of our objections is preliminary.

Often, of course, there is no clear distinction between objections to jurisdiction and objections to admissibility. Characterization may vary from case to case: it is the particular facts which are important. Thus, the non-existence of a dispute may be either an objection against admissibility, or to jurisdiction, depending on whether customary international law, or the text of a compromissory clause conferring jurisdiction on the Court is in issue. As indicated in our written pleading, our submissions are directed to establishing that, on the facts of this case, fine distinctions should not be made between objections based on jurisdiction *stricto sensu*, and other objections. This is all the more so as some of our objections, which are characterized by Nauru as going to admissibility, in fact go more to jurisdiction. For example, we have some doubts that our objections based on the absence of those States whose legal interests would be the very object of the judgment on the merits relates to admissibility *stricto sensu*.

We say further that paragraph 7 of Article 79 is not restricted to preliminary objections of a jurisdictional nature. It applies to all objections, whether they relate to jurisdiction, to admissibility, or to any other matter "the decision upon which is requested before any further proceedings on the merits". This is clear from the terms of paragraph 1 of Article 79. In the joint dissenting Judgment in *Nuclear Tests* it was said:

> "it would be pointless for us to characterize any particular issue as one of jurisdiction or of admissibility, more especially as the practice neither of the Permanent Court nor of this Court supports the drawing of a sharp distinction between preliminary objections to jurisdiction and admissibility. In the Court's practice the emphasis has been laid on the essentially preliminary or non-preliminary character of the particular objection rather than on its classification as a matter of jurisdiction or admissibility." (*I.C.J. Reports 1974*, p. 363.)

This observation, we submit, is equally applicable here. We refer also to the *Mavrommatis* case (*P.C.I.J., Series A, No. 2*, p. 10).

Hence we submit that each of Australia's preliminary objections must be dealt with as a preliminary matter and each is sufficient to end these proceedings. Each falls within paragraph 1 of Article 79.

None of our objections affects the merits of Nauru's case. Each is capable of determination at this preliminary stage without going into the merits. It follows that the Court should not, in our submission, defer decision on any of the preliminary objections. The Court should determine them now even if that involves issues of some complexity.

Mr. President, Members of the Court, let me explain, therefore, why the particular objections raised by Australia are preliminary in this manner and should be considered at this stage. Clearly, the question whether an objection is preliminary in character depends on whether the Court needs to decide the merits in order to decide the objection.

Whether or not an objection is "preliminary" is a matter of degree. Some objections necessarily have a substantially preliminary quality. But generally speaking, the preliminary character of an objection must depend on the circumstances of the case. An objection will not be "preliminary" in the relevant sense if it is so connected to merits issues that, in determining the objection, the Court determines the merits. Here we say that each of Australia's objections is capable of being determined at the preliminary stage without going into the merits of the case. For this reason, each must be regarded as preliminary.

Thus, if an objection does not require the Court to pass on the merits, it is preliminary in the relevant sense. As we have said, each of Australia's objections can be so decided without a decision as to the reponsibility of Australia for the substantive claims made against it by Nauru. No objection involves any prejudging of any legal submission on which Nauru's claims for relief directly depend. That is, no objection involves passing on Nauru's claim that Australia's failure to rehabilitate the worked-out phosphate lands constituted a breach of international law. Further, our objections based on Australia's reservation to the Court's jurisdiction and the need for the Court to have before it all States who are, in fact, involved in the so-called dispute, clearly also do not raise the substantive matter. None of our objections concerns the question whether the obligations arising under the Trusteeship Agreement were, or were not, fulfilled. Rather they concern only the legal effect of the termination of the Agreement. And also, of course, the issue of the Parties before the Court.

As I have mentioned, an objection does not cease to be preliminary simply because it requires some consideration of facts or evidence which may also bear on the merits of the case.

This is confirmed by paragraph 6 of Article 79, which we have referred to. It was also recognized by the Permanent Court in the *Polish Upper Silesia* case (*P.C.I.J., Series A, No. 6*, p. 15). There the Court stated that it might properly consider subjects belonging to the merits of the case, even at the preliminary objection phase, or else no such objection could ever be considered.

Thus, the applicant State cannot have preliminary objections deferred simply by pointing to some aspect of them which touches the merits. The Applicant must demonstrate in some clear way that the issue raised by the objection would involve a decision on the merits, so that it cannot be regarded as preliminary in the relevant sense.

At this stage we say that it is clear that it cannot be argued that the Court lacks the necessary evidence, or proof of facts, to be able to rule on Australia's objections at this stage. Australia has set out the factual and legal basis of its objections in some detail. It has also provided the relevant documentary evidence. All the relevant facts are before the Court. They are either admitted by

Nauru, or in the public domain, or evidenced by documentary material already before the Court. To make good its objections, Australia relies on the conduct and statements of United Nations bodies and of Nauru itself, as well as the terms of the Trusteeship Agreement and the Charter. There is, therefore, and we submit to the Court, no basis for any argument that the determination of Preliminary Objections would require factual or evidentiary material available only at the merits stage.

THE FACTS

Mr. President, Members of the Court, we turn now to the facts of this case. Australia has set out in Part One of its Preliminary Objections the factual material which it considers relevant. Our case is that all the evidence relevant to these preliminary objections is now in the Court's hands.

The salient facts are shortly summarized. From 1 November 1947 until 31 January 1968, as mentioned by the President this morning, Nauru was administered by three Governments under a Trusteeship Agreement approved by the United Nations. Article 2 of the 1947 Trusteeship Agreement provided that the three Governments — United Kingdom, Australia and New Zealand — would together constitute the joint authority to "exercise the administration of the Territory". The three Governments were to be called the "Administering Authority". Notwithstanding that the joint character of the Administering Authority was a distinguishing feature of the Trusteeship, Nauru seeks here to claim against Australia alone, as if it were the Administering State or Administering Authority.

The United Nations had considerable powers of supervision and control over the Trusteeship. These were powers which it regularly and effectively exercised. Our later submissions will deal with these matters. The Administering Authority not only reported annually to the United Nations on economic, political and social matters, but the United Nations also sent visiting missions to the Territory at three-yearly intervals between 1950 and 1965. Every year the Trusteeship Council enquired into the situation in Nauru and made its report to the General Assembly. The General Assembly specifically considered that report in its Fourth Committee. The result was that the United Nations, through its various organs, was kept fully informed of Nauruan affairs, including particular concerns about resettlement and rehabilitation and the phosphate industry.

Australia's preliminary objections refer to and rely upon the extent of United Nations involvement in Nauruan affairs in the Trusteeship period. Presently, we make two particular points. First, at no stage did the Nauruan representatives complain to the Administering Authority or to the United Nations that the failure of the Administering Authority to rehabilitate the worked-out phosphate lands amounted to a breach of the Trusteeship Agreement. The second point is that at no stage did the United Nations, through any of its organs, make a finding that the Administering Authority was in breach of the Trusteeship Agreement for this or for any other reason.

On the contrary, the record clearly shows that the Administering Authority responded to each and every United Nations recommendation in a very practical manner, and that the Administering Authority sought to shape its policies to meet the desires of the Nauruan people, as well as United Nations recommendations.

In Chapter 3 of Part I of Australia's Preliminary Objections, we have given a detailed account of these matters. I refer the Court to that account, including observations of the United Nations Visiting Missions, to whom was entrusted the task of supervising the Administering Authority in carrying out its Trusteeship obligations.

The first Visiting Mission to Nauru in 1950 reported:

> "that the Nauruans have derived considerable benefit from the [phosphate] industry is at once obvious to anyone visiting the Territory. On the whole, the Mission found the Nauruans better clothed, in better health, better nourished and better educated than usual at this time in Pacific Island territories." (Set out in paragraph 46 of Australia's Preliminary Objections.)

The final Visiting Mission in 1965 stated:

> "Thanks to the phosphate, this tiny island lost in the mid-ocean has houses, schools and hospitals which would be the envy of places with a very ancient civilization. Its citizens pay no taxes. Because of these favourable conditions and the spirit of mutual assistance characteristic of the inhabitants, poverty is virtually unknown in Nauru. There is a high standard of living; necessities and even many luxuries are imported. The stores and shops are well stocked with goods. Few people walk in this Territory, which has an area of 8 1/4 square miles and a circumference of 12 miles [less than 20 kilometres]; there are over 1,000 motor vehicles (not to mention bicycles) for a total population of 4,914, including 2,661 Nauruans (at 30 June 1964)." (Set out in paragraph 51 of Australia's Preliminary Objections.)

Nauru's present allegations, that Australia, as part of the Administering Authority, was guilty of maladministration, simply do not fit with these reports. Australia submits that the record is very clear: the administration of Nauru by the three Partner Governments was a successful one on any view; the more so when judged against the standards of the day. It very clearly fulfilled, we say, each of the United Nations' objectives for the Trusteeship Territory, as set out in Article 76 of the Charter. But, now Nauru asserts that Australia — and Australia alone — as one only of the Partner Governments, was in breach of its Trusteeship obligations when it failed to rehabilitate the worked-out phosphate lands.

The history of the Nauruan claim for rehabilitation, which appears from the admitted facts, shows that this claim has no basis. From the beginning of the Trusteeship, it was clear to everyone that steps would be necessary to be taken to provide for the Nauruan community when the phosphate lands were worked out. At the start, it was assumed by virtually everyone that resettlement elsewhere would be the appropriate answer. To use the language of the 1953 United Nations Visiting Mission, this was considered to be "the only practicable solution". As late as 1962, the United Nations Visiting Mission commented:

> "settlement . . . in a new home is unavoidable . . . no one who has seen the wasteland of coral pinnacles can believe that cultivable land could be established over the top of it, except at prohibitive expense. Even a layman can see that and it is to be noted that the suggestion for rehabilitation has never come from anyone who has visited the island." (Reproduced in paragraph 200 of Australia's Preliminary Objections.)

With the encouragement of the United Nations, Australia, as part of the Administering Authority, worked with Nauruan representatives to find a suitable place for resettlement. Nauruan representatives inspected Curtis Island in 1963 — that is an island off the Queensland coast in Australia — and found it satisfactory. Indeed, the record shows (paragraphs 60-63 of Australia's Preliminary Objections) that a great deal of effort was directed to resettlement, until the change of heart by the Nauruan people themselves, in October 1964. At that date the Nauruan community decided that it did not want resettlement. That decision was a little more than three years before independence, on 31 January 1968.

Between 1965 and 1967, there were many discussions concerning future political arrangements for Nauru and the phosphate industry. From 1966 onwards, the Partner Governments came under increasing pressure from the United Nations to move towards independence for Nauru by 31 January 1968 (United Nations General Assembly resolution 2226 (XXI) of 20 December 1966). The Nauruan representatives raised the matter of rehabilitation of worked-out lands with the three Partner Governments. The Partner Governments, including Australia, made it clear that they regarded rehabilitation of worked-out lands as impracticable, given the enormous cost involved and the doubtful benefit to the Nauruan community. They based these opinions on the negative expert reports which had been given on the subject.

As early as 1953, an enquiry by the Australian Commonwealth Scientific and Industrial Research Organisation (CSIRO) had concluded: "the regeneration of this [worked-out] land is a practical impossibility" (reproduced in paragraph 71 of Australia's Preliminary Objections). And this organization confirmed that view in 1959-1960 (reproduced in paragraph 72 of Australia's Preliminary Objections).

Then, in 1965, the United Nations General Assembly re-examined the matter and requested that "steps be taken ... towards restoring" Nauru (resolution 2111 (XX) of 21 December 1965). The Administering Authority took the first obvious step and appointed a committee of experts to examine the question of rehabilitation once again. That committee, known as the Davey Committee, reported to the Administering Authority and Nauru in June 1966. The Committee concluded that:

> "while it would be technically feasible (within the narrow definition of that expression) to refill the mined phosphate areas of Nauru with suitable soil and/or other materials from external sources, the very many practical considerations involved rule out such an undertaking as impracticable." (Reproduced in paragraph 81 of Australia's Preliminary Objections.)

In the face of this, it was apparent that rehabilitation was out of the question. Clearly the Partner Governments would not have been acting responsibly if they had begun a programme labelled "impracticable" by all the experts, especially if it involved diverting valuable financial resources from the Nauruan people. The Davey Committee Report was brought to the attention of the United Nations and neither the Trusteeship Council nor the General Assembly referred to the possibility of rehabilitation again.

As we have mentioned, in October 1964, the Nauruans themselves had chosen to reject resettlement as an answer. But their independence was only a few years away and, of course, as independent people they would be free to decide for themselves whether to accept or reject the advice of experts, including the experts who had already reported. After October 1964, it is clear that the only reasonable course left to the Partner Governments was to provide the Nauruan people with sufficient financial resources for a viable independent future, including the financial means to carry out rehabilitation, if that was their choice. In 1967, the real question was, "how should financial provision be made?"

The answer was the Canberra Agreement of 1967. By this Agreement, the Partner Governments transferred ownership and control of the whole of the phosphate industry to the Nauruans and did so on terms highly beneficial to the Nauruan people. The three Governments also transferred to the Nauruans all the funds accumulated from past phosphate royalties and intended to provide for the long-term future of the Nauruan community. When the Partner Governments gave up control of the phosphate industry, the British Phosphate Commissioners stayed on as managers, only until the Nauruan Phosphate Corporation could take their place. At the same time, the Partner Governments promised to buy the entire output of the phosphate industry, at a price to be varied, in accordance with market conditions. The Nauruan representatives specifically sought to purchase the assets of the British Phosphate Commissioners in Nauru, as part of their plan to take over the industry as a going concern. In doing so, they rejected the earlier proposal of the Partner Governments to run the industry as a 50-50 enterprise. The purchase price of A$21 million was the written-down or depreciated value, fixed by agreement between the parties, following a joint team assessment (see clause 8 of the 1967 Phosphate Agreement, Annex 9 of Australia's Preliminary Objections).

We say that, on any view, the 1967 Canberra Agreement was a generous settlement of all Nauruan claims, including that of rehabilitation. It was common practice at that time, in many parts of the world, to make only 50-50 division between the host State and the operator of a concession, such as the British Phosphate Commissioners. That fact was known to Nauru and the Partner Governments. Yet the Nauruans were given 100 per cent ownership (see the Report set out in Annex 7 of Australia's Preliminary Objections). The Canberra Agreement equipped the Nauruan community with very large financial resources, including a profitable business operation with an assured and profitable market. And, it left the Nauruans free to choose how they wished to spend these resources. The United Nations General Assembly knew all of this when it resolved to terminate the 1947 Trusteeship Agreement. It knew of the Davey Committee's gloomy report on rehabilitation prospects and it knew of the terms of the Canberra Agreement. It knew also that when Nauru achieved its independence it would do so with ample financial resources. For this reason, we say Nauru did not ask the United Nations to consider the matter of rehabilitation any further.

Mr. President, Members of the Court, what is clear in this case is that there is no claim that Nauru was left with inadequate resources at the time of independence.

There may be some disagreement as to the precise extent of the undoubtedly large resources of Nauru. In particular, the Court will recall that Nauru's Written Statement includes a paper by Mr. K. Walker replying to a paper on Nauru's Phosphate Income, which is Annex 26 of Australia's Preliminary Objections. Mr. Walker, in his Written Statement, correctly notes (in the Appendix to Nauru's Written Statement, paragraph A6) that there is an error in Table 5 of the Australian paper. That Table, entitled "Comparison of Per Capita Income, 1967", wrongly, as Mr. Walker says, showed the 1967 income of Nauru to be US$2,130. The correct figure is *Australian* $2,130 and we are grateful for Mr. Walker pointing out that error. However, Mr. Walker went on to say that the correct figure in United States dollars is US$1,902. This is per capita income in the year 1967. This is not so. We have made an error and confessed that. And Mr. Walker here has made an error which we refer the Court to. The correct figure for Nauru's per capita income in 1967 in United States dollars is 2,386 (an amount higher than that stated by Australia's Written Statement). Mr. Walker's error in calculating the United States dollar equivalent arises from the fact that in 1967 there was US$1.12 for every Australian dollar. Therefore, to convert from the United States dollars to Australian dollars, it was necessary to multiply by $1.12. Mr. Walker has incorrectly divided by $1.12, the sort of thing I mostly do myself. On correcting these errors of each Party in expressing this amount in United States dollars, the fact is that at the sum of $2,386 the Nauruan per capita income was higher in 1967 than that of New Zealand and the United Kingdom, and this can be seen from Table 5 of the Australian paper, Annex 26, page 169, of Australia's Preliminary Objections. I am sorry to have taken the Court into such detail of this matter but it is a matter of error which we were happy to confess and then to resolve.

Further, in his paper, Mr. Walker argues that the phosphate income paid into the Nauruan Trust Funds should not be counted as per capita income. On this analysis, he says the per capita national income figure for 1966-1967 would not be the sum of US$2,386, which is the corrected figure (or A$2,130) but Australian $776. It cannot be correct to ignore savings in the expression of national income. We say this is an approach which does not conform to national income accounting conventions. These provide that national income includes *all* income earned in a particular year, whether or not it is spent in that year. So national income must include both spending and savings. Mr. Walker's analysis we say is like saying that someone who earns $6,000 and saves $3,000 really only has an income of $3,000. So the error of this approach is obvious. Thus, the correct figure for per capita income in 1966-1967 for Nauru is the corrected amount just mentioned, namely US$2,386 and, as we have mentioned, that is a sum higher than that of New Zealand and the United Kingdom in that year.

Apart from this issue of per capita income in 1967, now clarified, the common ground between the Parties is that at independence Nauru was a wealthy country. In 1968 Nauru looked forward to a high income, with high national savings, making it one of the richest nations per capita in the world.

Further, the material before the Court makes it clear that Nauru has funds to cover its own estimates of the costs of rehabilitation. If the Trust Funds which were transferred to it at independence had been invested as intended, they would have given Nauru a capital of Australian dollars $83 million, without any other source of income. And the Nauru Rehabilitation Fund alone, deriving from post-independence mining, amounted to A$242 million in 1989 and A$260 million in 1991 (see paragraph 43 of Nauru's Written Statement). This more than covers the most recent estimate by Naurus' Commission of Inquiry, of the cost of rehabilitating the worked-out land.

The Rehabilitation Fund was established by an ordinance in 1968, shortly before independence (Annex 10 of Australia's Preliminary Objections). It was not the only fund created for the long-term future needs of the Nauruan people. The 1968 Ordinance itself indicates there were other funds available, including the Long-Term Investment Fund, established as early as 1947. One of the purposes of that Fund was for use by the Nauruans for resettlement or rehabilitation depending on their future decisions (paragraph 194, Australia's Preliminary Objections). This much had been made clear by Australia at the time the Fund was first established, and the Fund steadily increased, as a result of increases in the royalty rates paid by the British Phosphate Commissioners.

As to this matter of national wealth, Nauru says that the extent of its financial resources, both at independence and now, is beside the point. It states that its claim simply concerns "breach of obligations under the Trust" (paragraph 83 (iv) of Nauru's Written Statement). As Nauru puts its case, "whether or not Nauru had adequate reserves at independence is not the issue" (paragraph 36 of Nauru's Written Statement). Further, it asserts that whether or not the Nauru Rehabilitation Fund could finance the whole of the operation of rehabilitation of the island is "simply beside the point" (paragraph 62 of Nauru's Written Statement).

Our response is to say that the financial resources of Nauru at independence must be material to the question whether there has in fact been a breach of any obligation of the kind alleged. The Administering Authority saw the 1967 Canberra Agreement as the instrument through which the three Governments, including Australia, would fully and finally discharge their obligations to Nauru. The economic facts confirm that the effect of the 1967 Canberra Agreement was to leave Nauru financially secure, and free to determine for itself whether or not it wished to follow the path of rehabilitation. And, with this in mind, the United Nations terminated the Trusteeship and fully discharged the Administering Authority from its Trusteeship obligations.

So, some 23 years after independence, Nauru does not contest the adequacy of the financial arrangements made at independence, or the fact of its financial strength to cover the costs of rehabilitation, if it chooses to pursue that course. It merely says these facts are irrelevant. Nevertheless, it seeks to re-open financial settlements made as the basis for terminating the Trusteeship and granting Nauru independence.

Nauru has had 23 years to rehabilitate the worked-out land. It states that it has now started a pilot study. There is little evidence of the study's progress. Nauru has not claimed any great success and we say rehabilitation is still not shown to be feasible. It may be no more than wishful thinking. But there is a certain irony in the argument that Australia was under a legal obligation to take action to rehabilitate, when after almost a quarter of a century, Nauru itself has done so little to take the same action.

THE DISPUTE

We turn now to the so-called dispute. At bottom, the dispute is whether Australia, as part of the Administering Authority, should bear the cost of rehabilitating land worked out prior to Nauruan independence. Nauru and Australia agree that this was the subject of discussion and negotiation in the years leading to the Canberra Agreement. In these proceedings, Nauru alleges for the first time that Australia has been guilty of maladministration during the period of the Trusteeship. Nauru says, in essence, that Australia was in breach of obligations under the Charter and the Trusteeship Agreement, because it failed to rehabilitate worked-out land by phosphate mining prior to 1967. This, according to Nauru, makes the dispute a legal dispute. But at no time before these proceedings, either during the Trusteeship or after, has Nauru ever accused Australia or any of the Partner Governments of breach of the Trusteeship Agreement.

Australia submits that the jurisdiction of the Court is excluded in this case by virtue of the reservation contained in its Declaration of Acceptance of 17 March 1975, excluding "any dispute in regard to which the parties . . . have agreed . . . to have recourse to some other method of peaceable settlement". The recourse to the competent organs of the United Nations, the Trusteeship Council and the General Assembly was, we submit, such a means of settlement.

In addition, Australia submits that the Nauruan rehabilitation claim was settled and satisfied by the Canberra Agreement of 1967; any liability for rehabilitation was extinguished by the termination of the Trusteeship Agreement by the United Nations on 19 December 1967. Further, that any claim by Nauru for rehabilitation was waived when it accepted the terms of the Canberra Agreement or by the subsequent conduct of its representatives in the United Nations. We argue that each of these submissions is an issue of admissibility to be determined by the Court at this stage.

Furthermore, as we have already indicated, Australia submits that the Court cannot proceed to hear this case without the consent of the United Kingdom and New Zealand. The Administering Authority was, as I have said, the three Governments, not Australia acting alone. The United Kingdom and New Zealand are indubitably parties to a dispute — if there is any — and are not sued by Nauru. Professor Pellet will explain to the Court how the absence of the two other parties is fatal to Nauru's claim.

Australia also makes specific submissions on non-admissibility and lack of jurisdiction in relation to Nauru's claims for overseas assets of the British Phosphate Commissioners, and on the issue of absence of good faith. Counsel will deal with those issues in due course.

As I have indicated, Australia submits that the Nauruan claim for rehabilitation was settled, satisfied or waived in the comprehensive settlement reached by the Partner Governments with Nauruan representatives prior to independence. That settlement is, as we have seen, evidenced in the Canberra Agreement of 1967. The Agreement formed the basis of the United Nations decision to terminate the Trusteeship, a decision having the unqualified support of Nauruan representatives.

The negotiations which resulted in the Canberra Agreement related to four issues:

(*a*) resettlement;
(*b*) rehabilitation;
(*c*) the price of phosphate; and
(*d*) the control of the phosphate industry.

Each of these matters had been the subject of consideration and report by the United Nations. The making of the Agreement meant that each of these matters ceased to be an issue between the parties. This is because the Partner Governments and Nauru, by its representatives, agreed at the time the Canberra Agreement was made that all four issues should be laid to rest, as between the Administering Authority and the Nauruan community, on the basis that, on its forthcoming independence, Nauru would take over ownership and full control of the phosphate deposits, the phosphate industry, and its associated investment funds. This meant that Nauru might in the future make its own choices, whether or not for rehabilitation. We say the United Nations endorsed this, and on this basis agreed to terminate the Trusteeship.

Nauru now says most emphatically that its claim for rehabilitation stems from the Trusteeship obligations. This does not, however, fit with the statement made by the Head Chief Hammer DeRoburt on 22 November 1967. He then made it clear to the Trusteeship Council that he did not consider rehabilitation was:

> "an issue relevant to the termination of the Trusteeship Agreement, nor did the Nauruans wish to make it a matter for United Nations discussion" (paragraph 178 of Australia's Preliminary Objections).

Australia submits, before the Court today, that Nauru cannot have it both ways. If the rehabilitation claim does not relate to Trusteeship obligations, then we say there is no legal basis for it. If the claim arises from Trusteeship obligations, then it must, we submit, be taken to have been settled by the unqualified termination of the Trusteeship which was warmly supported by Nauru at the time. It is this late change of heart by Nauru which lies behind the Australian view that there is some absence of good faith in the institution of these proceedings over 20 years after independence. Indeed, let me say this, a review of the treatment of this issue in the United Nations leads to only one conclusion: the United Nations did not regard the failure to rehabilitate as a breach of the Trusteeship Agreement. Clearly also, it did not regard it as an issue which survived the termination of the Trusteeship.

The records make it clear that the United Nations was very much aware of the Nauruan rehabilitation claim. The Trusteeship Council Report for 1966 clearly shows that the Council not only knew of the Nauruan claims but also of the serious doubts about the feasibility of rehabilitation (see paragraphs 167 to 168 of the Preliminary Objections). It was for this reason that it pressed the Administering Authority to make appropriate investigations. Consider also the Liberian recommendation at the General Assembly of 1966, that the Administering Authority take steps towards rehabilitation. This became General Assembly resolution 2226 (XXI) to which further reference will be later made. It is clear, however, that the Report of the Committee of Experts — the Davey Committee — made available to the Trusteeship Council in May 1967, had a significant effect: for in June 1967, the Trusteeship Council declined to support another Liberian resolution calling for rehabilitation by the Administering Authority, although it did, of course, note the continuing differences on the question.

In endorsing Nauruan independence in November 1967, the Special Trusteeship Council made no mention of the rehabilitation issue. This was no doubt because, as already mentioned, Nauru had indicated that rehabilitation was not an issue relating to trusteeship. In December 1967, the Nauruan Head Chief went so far as to say to the Fourth Committee that Nauru would have ample resources to meet the future problems of worked-out lands and the ending of the phosphate industry (paragraph 181 of Australia's Preliminary Objections). It was in keeping with this that the United Nations General Assembly unanimously passed resolution 2347 (XXII) which ended the Trusteeship Agreement; it said nothing about the issue of rehabilitation.

Clearly, the Trusteeship Council, the Fourth Committee and the General Assembly, as well as the Administering Authority, agreed to end the Trusteeship Agreement on the basis that all those issues which had been the subject of negotiation and debate were definitively settled prior to independence.

The precise legal consequences to be drawn from these uncontested facts are the subject of our submissions.

There are, however, a few general points which we first make. First, even in its preliminary aspects, this case may have wide-ranging implications for what may be termed "former colonial issues". The Nauruan claim invites the Court to reopen a settlement made with independence in view. For the Administering Authority, there is a clear interest in finality, in closing the chapter once and for all time. But a decision of this Court may have significant implications for the finality of independence settlements generally. The stability of post-independence relationships between States must be a matter of significant concern.

Secondly, Australia joins with Nauru in so far as Nauru invites the Court to decide this case (and that includes our Preliminary Objections) on the legal grounds that are stated in the written pleadings and the oral submissions. This is not, after all, a case of rich against poor State. There is no need for emotive arguments. It is not a case of David and Goliath, or of a tiny island and a large metropolitan power. Throughout the Trusteeship, the Administering Authority, including Australia, as well as the Nauruan community were subject to the supervision and overall control of the United Nations. The Nauruan community enjoyed the full protection of the United Nations and each Party acted on an informed basis throughout.

Before this Court, of course, the equality of the Parties will be preserved. Rich or poor, large or small, the Court will ensure that their legal rights have equal protection.

Yet, Mr. President, Members of the Court, here we are faced with an allegation that Australia has in some way breached the Trusteeship Agreement. From Australia's point of view, this is a strange outcome to a successful administration of Nauru which, so far as the Administering Authority was concerned (including Australia), was recognized, supervised and discharged by resolution of the competent organs of the United Nations. It is the legal consequences to be drawn from these undisputed facts that are the subject of our submissions.

Professor Jiménez de Aréchaga will present our submissions next, concerning the effect of Australia's reservation, excluding any dispute the subject of some other agreed method of settlement.

Professor Bowett, tomorrow, will present our submissions concerning the legal effect of the termination of the Trusteeship on the claim to rehabilitation.

Mr. Burmester will then present our submissions concerning Nauru's claim to the overseas assets of the British Phosphate Commissioners. He will also deal with the issue of good faith.

And, as I have said, Professor Pellet will present our submission that Nauru's claim against the Administering Authority cannot be determined in relation to Australia, without the presence of the United Kingdom and New Zealand. His submissions we expect will be completed on Wednesday.

If the President pleases, that is the extent of our opening submissions.

The Court adjourned from 11.15 to 11.30 a.m.

ARGUMENT OF MR. JIMÉNEZ DE ARÉCHAGA

COUNSEL FOR THE GOVERNMENT OF AUSTRALIA

Mr. JIMÉNEZ DE ARÉCHAGA: Mr. President, distinguished Members of the Court.

INTRODUCTION

I have the honour of appearing before you again and it is my task to present the Preliminary Objection against the Court's jurisdiction which has been raised by Australia on the basis of its reservation, which excludes "any dispute in regard to which the parties thereto have agreed to have recourse to some other method of peaceful settlement".

In its Written Statement, Nauru deals perfunctorily with this jurisdictional objection, portraying it as referring exclusively to the method of direct negotiations between the Parties. This is to misunderstand our argument. On the basis of this misinterpretation, our adversary submits that the objection should be rejected or declared not to be of a preliminary character.

We shall try to demonstrate that the means of peaceful settlement agreed upon and utilized by the Parties, in respect of the dispute, were not simply direct negotiations but included as well certain methods of peaceful settlement resulting from the complex mechanism established by the United Nations Charter for the supervision of a trusteeship administration.

The exercise, during 20 years (between 1947 and 1968), of these various other methods of pacific solution, and the interaction between them, did result in the settlement of all the facets of the dispute which Nauru now brings before the Court.

Through the exercise of the United Nations functions of supervision of a trusteeship administration, several traditional methods of peaceful settlement of disputes were brought into play. The process comprehended an amalgam of elements of investigation, enquiry, mediation and conciliation, together with negotiations, conducted not directly between the parties but under the aegis and under the control of the competent United Nations organs.

The Trusteeship system of supervision established by the Charter embraced those traditional methods and, in so doing, it became a specific method of its own, "the method of the Charter", exercised through the normal processes of the Trusteeship system and specially designed to examine in a contentious way and to solve new kinds of disputes, not between States, but arising between the Administering Authority and the indigenous inhabitants, the people whose rights were preserved by Article 80 of the Charter.

So far as the Administering Authority was concerned, there was a clear, legal obligation to submit to this special Charter system for the settlement of disputes. They had no option but to accept it. The essence of Nauru's case is that Nauru had no such obligation but remained free to resort to the International Court, whenever it chose, after independence. Australia's position is that both parties — the Administering Authority on the one hand, and Nauru on the other — were bound by the same obligation. The régime did not envisage a preferential system for Nauru.

In order to support this contention, I have to engage in a brief description of certain relevant aspects of the Trusteeship régime, in particular, the handling of disputes in that system.

The Handling of Disputes in the Trusteeship System

One key mechanism of the Trusteeship régime was the power granted to the competent United Nations organs to send Visiting Missions to the trust territories.

This power was combined with the right recognized to the peoples to submit petitions, orally or in writing, even directly to the Visiting Missions. These petitions were subject to adversary examination with special representatives of the Administering Authority. The combination of these powers resulted in an application of a traditional method of peaceful settlement mentioned in Article 33 of the Charter: the method of investigation or enquiry.

The utilization of this method culminated with the double supervision and scrutiny exercised annually, first by the Trusteeship Council and secondly by the General Assembly through its Fourth Committee.

These organs questioned the performance of the Administering Authority, on the basis of three sources of information: the reports of the Visiting Missions; the examination of petitions and the report presented by the Administering Authority, in the form of answers to a detailed questionnaire.

On those bases of fact, the Trusteeship Council made recommendations and suggestions in a new report, a report of its own, addressed to the General Assembly. Article 50 of the Rules of Procedure of the Trusteeship Council provided that this Report:

> "shall contain suggestions and recommendations for the improvement of the administration of the territory, and *for dealing with any problem in regard to the territory*".

That was the specific provision of the Rules of Procedure of the Trusteeship Council dealing with any problem with regard to the territory. The General Assembly, in its turn, made its own recommendations or endorsed those of the Trusteeship Council. These recommendations were addressed not just to the Administering Authority, as originally envisaged, but also to the representatives of the administered communities. The two sides in conflict were directed to proceed to consultations and negotiations in order to settle their differences.

But all that was not the end of the matter. The implementation of these consultations and negotiations had to be reported back to the United Nations organs, so that these reports were, in turn, critically examined in subsequent years by both supervisory United Nations organs.

It seems difficult to deny that this whole system of supervision embraced the application of two traditional methods of peaceful settlement, described in the treatises of International Law as the functions of mediation and conciliation.

Clearly, the action of the competent United Nations organs went beyond the function of good offices, since it was not confined to bringing the two sides to the negotiating table. The Trusteeship Council and the General Assembly not only recommended the prosecution of consultations and negotiations, they suggested concrete terms of adjustment and they controlled the implementation and the result of the recommended negotiations.

Above all, it was the responsibility of the United Nations organs to ensure that there was no breach of either the Charter or the Trusteeship Agreement. Whenever there was evidence of a breach — whether derived from the complaints of the people of the administered territory or from the United Nations own investigations — it was the duty of the United Nations bodies to ensure compliance with its obligations by the Administering Authority.

In short, the United Nations trusteeship system of supervision incorporated with respect to the special kind of dispute we are dealing here, at least four traditional methods of peaceful settlement: investigation or enquiry; mediation, conciliation and supervised negotiations.

THE FOUR ISSUES IN DISPUTE

These general considerations were applied in the case of Nauru, whose population enjoyed a substantial degree of political advancement, possessing representative organs, democratically elected by direct and universal suffrage. These elected representatives were fully capable to present and negotiate their claims vis-à-vis the Administering Authority and did so under the supervisory control of the competent United Nations organs. The status of Nauru as a valid interlocutor, possessing a separate identity and qualified as a proper Party to the disputes with the Administering Authority is not in dispute in these proceedings. It has not been questioned by Nauru in its Written Observations (para. 102); cf. also Preliminary Objections of Australia, paras. 184-186).

In its Written Observations, at paragraph 90, Nauru objects that there is no evidence of a formal agreement to negotiate or to have recourse to other methods of peaceful settlement.

However, the exercise by the Nauruan representatives of their rights under the Charter; the invocation by them vis-à-vis the Administering Authority of the powers granted to the United Nations organs constituted a tacit acceptance, an acceptance by conduct, and an actual recourse to these other means of peaceful settlement.

The dispute between Nauru and the Administering Authority now brought before the Court, was previously submitted to the competent United Nations organs and concerns the whole performance of the Trusteeship administration. But in particular, it refers to four closely related issues, all arising from the state of the worked-out mining land.

These four closely related issues are:

1. the resettlement of the Nauruan population;
2. the royalties paid to the long-term trust funds;
3. the transfer of the phosphate operation; and finally
4. the rehabilitation of the worked-out land.

With respect to these four issues the action of the United Nations organs consisted in inquiring into the relevant facts and making recommendations designed to promote negotiations and consultations between the Administering Authority and the representatives of the people of Nauru.

Subsequently, in analysing annually the various reports on the territory, the Trusteeship Council and the General Assembly supervised the implementation of their previous recommendations and suggestions, and suggested further steps for the final adjustment of the remaining differences.

We shall see briefly how these procedures developed in respect to each one of the four issues we have identified.

1. The Question of Resettlement

The early Visiting Missions considered that the only long-term solution for Nauruan problems, the only alternative they said was "the resettlement of the population elsewhere" (1953 Visiting Mission, para. 35, reproduced in Annex 8 of Nauru Memorial).

This was the recommendation suggested by the Trusteeship Council in the early 1960s. However that recommendation was subject to an important proviso. Resettlement could not be imposed by the Administering Authority or even by the General Assembly; "the final decision and choice of alternatives", said the Trusteeship Council, "would rest entirely with the Nauruan people" (Report of the Trusteeship Council 1960, A/4404, p. 149).

The record shows that representatives of the people of Nauru conducted an inspection of Curtis Island in 1963 and found it satisfactory. However, the Nauru Local Government Council was finally unable, in October 1964, to accept the proposal for resettlement in Curtis Island (cf. Preliminary Observations of Australia, paras. 194-206).

The rejection of resettlement by the Nauruan Council, seen in retrospect, was a hard-headed choice based on economic benefits. As the 1962 Report of the Trusteeship Council (A/5204, p. 31) foresaw:

> "it could hardly be expected that they would ever wish to go back to the restricted and isolated life of a remote island without the peculiar advantages of the island they now occupied".

In short, the Nauruans chose assured prosperity on Nauru, however unattractive the environment, instead of relative poverty on an unspoiled Curtis Island.

Thus, the investigations and negotiations which were carried out in order to solve this first issue of resettlement, reached an impasse, but the question was solved in this way in full accordance with the recommendations of the Trusteeship Council and the General Assembly to the effect that "the final decision and choice of alternatives should rest entirely with the Nauruan people".

2. The Royalties Paid to the Long-Term Trust Funds

A second dispute between the Administering Authority and the Nauruan Local Government Council, during the 1950s, concerned the adequacy of the royalties paid to the Nauruans, out of the proceeds of the phosphate operation. The Memorial is so emphatic on this complaint that it describes the alleged insufficiency of the royalties paid as "the root of our claim" (Memorial, para. 298).

Yet, as a consequence of the recommendations made by the Visiting Missions and by the Trusteeship Council, the royalties were continuously increased in the 1960s, that is to say, in the period in which the United Nations supervision was most effective.

Thus, in 1961-1962 the Visiting Mission described the increases of that period as "substantial". The Trusteeship Council Report for 1961-1962 (A/5204) noted "from the Report of the Visiting Mission that the rate of royalty derived by the Nauruan people from the phosphate has been increasing over the years" (p. 41, para. 65), going from 4 per cent to 24 per cent (para. 63) and in 1964 the royalties paid to the Long-Term Investment Fund were increased in the proportion of three to one (Preliminary Objections, Vol. II, Ann. 5, pp. 20-21).

In 1965 the Trusteeship Council further welcomed what it called another "notable increase in royalty rates" (A/6004, p. 50).

The satisfactory improvement reached on this money dispute was a direct consequence of the methods of control and supervision exercised by United Nations organs. What was decisive in this respect was the original idea of the Trusteeship Council of advocating consultations and regular annual meetings not just between the Administering Authority and the Nauruan Council, but between this Council and those who kept the strings of the purse, namely the British Phosphate Commissioners (Trusteeship Council Report, 1962, p. 39).

And, we may ask, to where were those royalties paid?

From the very beginning of the Trusteeship régime, the Administering Authority established a long-term fund whose purpose was described in the first report, the 1947-1948 Report of the Administering Authority. This early Report informed the General Assembly that "Special trust funds have been created which will mature with later generations of Nauruans, providing them economic means established in the days of abundance" (p. 24).

Again in 1953, the Administering Authority reiterated to the Trusteeship Council that "a trust fund was being accumulated from year to year with a view to safeguarding the economic future of the Nauruan people" (United Nations, *Yearbook*, 1953, p. 582). On their part, the United Nations supervisory organs agreed with the policy of the Administering Authority which was "reluctant to increase payments to individual landowners, preferring to pay any increases to trust funds for the benefit of the whole Nauruan community" (*Yearbook*, 1953, p. 582). The Trusteeship Council endorsed in 1958 this policy of the Administering Authority recommending "that any increase should apply mainly to the Nauruan Community Long-term Investment Fund" (Report of the Trusteeship Council, 1958, p. 99).

3. The Transfer of the Phosphate Industry

The issue concerning the ownership and exploitation of the phosphate industry was settled in full accordance with the recommendations of another organ of the United Nations; not the Trusteeship Council but the Special Committee of the General Assembly on the Situation with regard to the implementation of the declaration on the Granting of Independence to Colonial Countries and Peoples, also known as the Special Committee of 24, with responsibility for enforcing resolution 1514 of the General Assembly. This body recommended in 1964 that "the Nauruans should be given full control over their natural resources" (Annex 8 of the General Assembly, *Official Records*, 19th Session). This followed calls by the Trusteeship Council in earlier years for the Nauruans to be consulted on the issue of an equitable share in the phosphate industry (*Trusteeship Council Report* 1963, p. 28).

Again in 1966, the Special Committee of 24

> "noted that talks were to be held shortly between the people of the Territory and representatives of the Administering Authority regarding the ownership of and control over the operations of the phosphate industry. The Special Committee of 24 stated that the Nauruans should be given full control over their natural economic resources and the Committee hoped that the forthcoming discussions would resolve all outstanding questions in this regard." (*Yearbook*, 1966, p. 541.)

Following the lead of the Special Committee of 24, the Trusteeship Council, in 1966, invited the Administering Authority to give attention to the provisions of the General Assembly resolution of 14 December 1962 concerning permanent sovereignty over natural resources (Preliminary Objections of Australia, Vol. II, Annex 28, p. 241, para. 389).

The settlement reached in the 1967 Canberra negotiations concerning the ownership and exploitation of the phosphate industry, more than complied with the recommendations of these United Nations organs. Nauru received much more than the bare natural resources to which it is entitled under the doctrine of permanent sovereignty over natural resources. It received, in addition, a prosperous industry functioning as a going concern, with an assured market at international prices, plus all the facilities and installations required to continue the exploitation without a single day's interruption. These installations were purchased at original cost less depreciation instead of the more expensive replacement cost. Moreover, during three years the Nauruan Corporation received the technical assistance necessary to undertake full management of the industry.

The Administering Authority, as the Solicitor-General has just said, abandoned the claim for a share in the benefits, despite the fact that a 50 per cent sharing of benefits was the prevailing rule in taking control of mining operations of a similar nature (Preliminary Objections of Australia, Vol. II, Annex 7, p. 33). Moreover, a further increase in royalties was fixed for the period 1966-1967.

These terms of settlement concerning the transfer of the phosphate industry were such that the Trusteeship Council:

> "noted with satisfaction that the ownership, control and management of the phosphate industry would be transferred to the Nauruans by 1 July 1970, and that transitional arrangements provided for a substantial increase in phosphate royalties and for the increased participation of the Nauruans in the operation of the industry" (Preliminary Objections, Vol. II, Annex 8, p. 242).

4. *The Rehabilitation of the Worked-Out Land*

It is of particular interest for present purposes, to recall the process followed with respect to the handling by United Nations organs of the question concerning the rehabilitation of the worked-out mining land.

In compliance with the General Assembly request in 1965 that steps be taken towards restoration of the land, agreement was reached between the Administering Authority and the Nauruan Government Council, at the 1965 Canberra Conference for "the setting up of an independent technical committee of experts to examine the question of rehabilitating the worked-out mining land" (Summary of Conclusions, Nauru Memorial, Vol. III, pp. 196-197).

The Trusteeship Council was directly involved in the setting up and in the membership of this Committee, which was "Appointed to Investigate the Possibilities of Rehabilitation of Mined Phosphate Land" — its official title. This title indicates that this body of investigation or enquiry was called upon to report on the issue of the feasibility and practicability of the rehabilitation of the mined-out area.

As to the membership of this Expert Committee, the Trusteeship Council asked a specialized agency of the United Nations, the Food and Agriculture Organization (FAO) "to give favourable consideration to an invitation by the Administering Authority to make a representative available to serve on this Committee" (*Trusteeship Council Report 1965*, p. 50).

The experts finally appointed were persons with high qualifications and the Nauruan representatives approved their appointment (A/6700, para. 380, Annex 28 of Preliminary Objections of Australia, Vol. II, p. 241).

The Trusteeship Council informed the General Assembly in its 1965 Report that "it looked forward to the Report of the Expert Committee" (*Trusteeship Council Report 1965*, p. 30).

Other evidence of the importance assigned by the Trusteeship Council to this report was that in 1966, it "requested the Administering Authority to make the report available to Council Members as soon as possible" and recommended that it be studied as soon as possible" (*Trusteeship Council Report*, para. 408). The decisive relevance of this report on the issue of restoration of the land may be gathered from a proposal made by Liberia in the Trusteeship Council requesting rehabilitation but subordinating it to a condition: "should the Committee of Experts consider that rehabilitation of the land is feasible" (A/6300, p. 45, para. 426). A proposal which was not adopted.

The report of the Expert Committee was made available to the members of the Trusteeship Council on 16 May 1967 (A/6700, para. 384), a few months before the termination of the Trusteeship.

In the 1967 ordinary meeting of the Trusteeship Council, this body "noted that the Report of the Committee of Experts on the rehabilitation of the worked-out land . . ." concluded "that the very many practical considerations involved ruled out such an undertaking as impracticable" (*Yearbook*, 1967, p. 600).

The Trusteeship Council further noted that "The Nauru Local Government Council . . . could not, in general, accept its conclusions" (A/6700, para. 385, reproduced in Annex 28, Preliminary Objections).

On 22 and 23 November 1967, five months after receiving the Report, the Trusteeship Council met in a special session in order to deal with an Australian request concerning the termination of the Trusteeship Agreement and the declaration of independence of Nauru as from 31 January 1968.

The Trusteeship Council adopted unanimously, on a proposal submitted by Liberia, its resolution 2149 (2) in which it noted that it had been agreed that Nauru would accede to independence on 31 January 1968.

Paragraph 3 of the Trusteeship Council resolution referred expressly to the Agreement of the Administering Authority for the adoption of the resolution terminating the Trusteeship. This requirement derives from Article 79 of the Charter, which demands the agreement of the States directly concerned for any alteration or amendment of a trusteeship agreement.

It is significant that resolution 2149 of the Trusteeship Council did not include any mention of the question of rehabilitation of the land. The usual Liberian proposal recommending restoration of the land was not made and the issue was not taken up by either the Fourth Committee of the General Assembly.

The action of the General Assembly is even more significant. General Assembly resolution 2347 concerning independence, approved unanimously, put an end to the Trusteeship Agreement and declared Nauru independent, without saying a word about an alleged subsisting duty or obligation on the part of the former Administering Powers to restore the worked-out land or to assume any financial liability in that respect. Instead of the missing provision concerning restoration of the land, a paragraph was added to the resolution, at the level of the Fourth Committee. The Nauruan Council, invoking the enormous expenses and difficulties involved in such a rehabilitation project, had previously requested "United Nations assistance in this matter" (A/6004, Report of the Trusteeship Council, p. 312). Having regard to this earlier request, the General Assembly Fourth Committee added a new paragraph to resolution 2347.

> "urging the organs of the United Nations concerned and the specialized agencies to render all possible assistance to the people of Nauru in their endeavour to build a new nation".

In the written statement of Nauru, it tries to explain this eloquent silence of General Assembly resolution 2347 by saying that the United Nations organs did not deal with the subject of land rehabilitation because the representatives of Nauru "did not wish to make it a matter for United Nations discussion" (Preliminary Objections of Australia, Vol. II, Ann. 29, p. 249).

This explanation is unacceptable. The representative of Nauru had no power or right to withdraw unilaterally from consideration by United Nations organs an issue which had been in the agenda of the United Nations organs, had been actively considered by them at least since 1951 and was discussed in November-December 1967, both in the special session of the Trusteeship Council and in the General Assembly. So, the silence on the issue of rehabilitation in the resolution speaks for itself. The undeniable fact is that General Assembly resolution 2347 did not demand from the Administering Authority the rehabilitation of the land nor declare its financial liability in that respect. There were incidental references to the question in isolated statements by two delegations, those of India and the USSR, but, differently from what had occurred in previous resolutions, there was no support or pronouncement by the General Assembly membership on this issue of rehabilitation.

It is true, as remarked in the Memorial, that the Preamble of resolution 2347 recalls the previous resolutions of the General Assembly where reference was made to the subject. But this citation and re-citation of preceding resolutions in the Preamble is a common practice of the General Assembly, devoid of any normative or operative effect. The assertion in the Nauruan Written Observations (para. 239, p. 83) that there was a "reaffirmation" of the preceding resolutions, is inaccurate. The phrase in the preamble of resolution 2347 merely *recalls* the historical fact that previous resolutions were adopted, but it does not reaffirm their contents. The Preamble of resolution 2347 also recalls the recommendations urging a future independence, but obviously those recommendations, even if recalled, had ceased to have any operative effect once independence had been actually declared. In the same way, the previous recommendations on land restoration became devoid of object once the independence of Nauru was declared and the Trusteeship terminated. The Trustee was *functus officio* and divested of all authority in the territory so that it could no longer go into the island to carry out the recommended restoration. The adoption of resolution 2347 was a final opportunity to condemn any alleged misperformance of the Trustee and "transform the rehabilitation claim into a demand for pecuniary compensation" (Memorial, p. 118).

The adoption of resolution 2347 was the proper occasion for such a condemnatory pronouncement and none was forthcoming.

Consequently, there was discharge from that claim. As the Roman jurist Paulus put it: the power to condemn implies the power to absolve.

It is legitimate to ask what were the reasons that explain such an eloquent silence in the General Assembly resolution.

THE EXCHANGE IN THE FOURTH COMMITTEE

One of these reasons must be found in an exchange which took place between the representatives of Australia and of Nauru in the presence of the whole membership of the United Nations, in the Fourth Committee of the General Assembly

As already indicated, despite the attempt of Nauru to withdraw the question of rehabilitation from discussion at the United Nations, both Parties dealt with the subject of rehabilitation and of financial liability in that respect.

The representative of Australia, after referring to the various agreements reached at Canberra in 1967, stated:

> "if the price paid for the phosphate and the cost of production remain in much the same relationship as now and the Nauruan people put aside the same proportion of their funds as they put aside last year for their long-term fund, this fund will, on the exhaustion of the phosphate deposits in 25 years, stand at approximately dollars 400 millions.
>
> This may seem a very large amount of money, but it must be remembered that Nauru has only one major economic asset, which is a wasting one.
>
> This money is necessary to sustain the future generations of Nauruans." (Preliminary Objections of Australia, Vol. II, Ann. 31, p. 275.)

This statement, if it were incorrect or inaccurate, called for an immediate rectification and reply from the Nauruan representative who was then sitting in the Fourth Committee of the General Assembly as a member of the Australian delegation.

Yet, although an answer was given, it was not in opposition or correction to what the representative of Australia had just said. On the contrary, it confirmed the Australian statement.

Head Chief DeRoburt began by admitting the strength of Nauru's economy at that time. He said: "Economically Nauru's position was strong because of its good fortune in possessing large deposits of high-grade phosphate."

But he also recognized the existence of problems, saying:

> "That economic base, however, presented its own problems. One which worried the Nauruans derived from the fact that land from which phosphate had been mined would be totally unusable."

And he added that a second problem was, and I again quote him, "that phosphate was a wasting asset: in about 25 years time the supply would be exhausted".

This frank presentation of the problems before the whole United Nations membership required from DeRoburt an answer as to how he intended to solve these problems. His answer was:

> "Consequently, although it would be an expensive operation, that land would have to be rehabilitated and steps were already being taken to build up funds to be used for that purpose."

Now, the immediately obvious question in the mind of the audience of the Fourth Committee, was how those funds were going to be set up, what would be their financial source? Head Chief DeRoburt's answer identified two sources of funds and distinguished one from the other from a chronological point of view. He said:

> "The revenue which Nauru had received in the past and would receive during the next 25 years would, however, make it possible to solve the problem."

The revenue received in the past was obviously the sum of the Trust Funds accumulated by the payment of royalties during the Trusteeship regime. The revenue which Nauru would receive during the next 25 years clearly referred to the profits to be generated by the phosphate industry, totally transferred to Nauru as owner and manager.

Between these two sources, one referring to the past, the other to the future, there is no room for the additional claim now advanced against Australia, as if Australia constitutes a sort of additional or substitute provider of funds to be called up to contribute as soon as other sources had been dissipated or a substantial debt has been incurred.

The interpretation we have advanced of Head Chief DeRoburt's words is confirmed by the subsequent phrases in his statement. He makes reference to what he calls "alternative sources of income", namely the Trust Funds then in existence but he does not mention at all, even by way of a reservation, any pending or eventual claims against the former Administering Authority. He said:

> "Already some of the revenue was being allocated to development projects. So that Nauru would have *substantial alternative sources of work and of income* long before the phosphate had been used up. In addition, a *much larger proportion of its income* was being placed in a long-term investment fund, so that, whatever happened, future generations would be provided for."

Finally, Head Chief DeRoburt concluded with a categorical assertion of financial autonomy:

> "In short, the Nauruans wanted independence, and were confident that *they had* the resources with which *to sustain it*." (Preliminary Objections of Australia, Vol. II, Ann. 30, pp. 256-257.)

The other Party has emphasized previous statements by Head Chief DeRoburt containing a reservation, but these were cancelled by this latter, conclusive statement made formally before the Fourth Committee of the General Assembly.

Undoubtedly, there was a change on the part of the Head Chief between what he said in Canberra and in the Trusteeship Council, and what he did say and especially what he left unsaid before the Fourth Committee. But the conclusion is unavoidable that Head Chief DeRoburt did not maintain there his claim against Australia and in effect dropped it in the presence of the whole membership.

It may be asked what were the reasons for this change of position. It is possible to give only hypothetical answers, since a total explanation may perhaps only be found in exchanges in the corridors of the General Assembly. Doubts raised by some Members as to the long-term economic viability of Nauru may have determined that assertion by Head Chief DeRoburt when he proudly said that the Nauruans "wanted independence and were confident that *they had* the resources with which to sustain it".

Perhaps the need, or the desire to obtain a unanimous vote, including the consent of the three Partner Governments, may have advised a less challenging attitude. But these are only speculations.

What is a fact is that, as a result of that statement, there was, in the General Assembly, for the first time, an absence of support and general receptivity for the issue of the restoration of the land. Head Chief DeRoburt's statement discouraged other Members from any idea or intention to submit proposals or paragraphs in the resolution concerning that issue. This is shown, for instance, by the attitude of Liberia, an active Member and then President of the Trusteeship Council. Liberia had been in previous sessions the champion of rehabilitation of the land, submitting repeated proposals to that effect. Yet, in November and December 1967 Liberia abandoned that issue, despite being the proponent of the

Trusteeship Council and the General Assembly final resolutions, where no reference at all is made to that subject.

Besides Head Chief DeRoburt's statement, three converging factors explain the general change of heart in the General Assembly on this matter. These factors were: (1) the Expert Committee's report which concluded on the factual impracticability and the economic absurdity of trying to refill the worked-out areas; (2) the complete transfer of control over the phosphate operation and the generous terms of that transfer; and (3) what the Trusteeship Council described as the notable increase in the royalties paid to the long-term Trust Fund for the benefit of the Nauruan Community and the very substantial value of this Fund even at the time of independence.

On the basis of these considerations there was an implicit endorsement by the General Assembly of the Administering Authority position, which had been reiterated by Australia time and again at the Canberra Conference and at the United Nations organs.

Let us be clear on Australia's position, as it was formally described by its representatives. It was not one of declining "responsibility for meeting the cost of rehabilitation" but on the contrary to assert that it had met that responsibility

> "by ensuring that the payments to the Nauruans would be sufficiently generous to meet all expenditure necessary for rehabilitation, if they [the Nauruans] decided upon it" (Preliminary Objections of Australia, Vol. II, Ann. 7, p. 34; see also Ann. 28, p. 242, para. 401).

To accomplish this purpose the Administering Authority left Nauru a double source of funds. The first one was the Trust Funds, not only the Nauruan Long-Term Investment Fund established in 1947, but also the new Nauruan Rehabilitation Fund established by Australian Ordinance of 25 January 1967 which prescribed that the monies

> "shall not be expended otherwise than for the purpose of restoring or improving the parts of the island that had been affected by mining for phosphate" (Preliminary Objections of Australia, Vol. II, Ann. 10, p. 88).

According to figures published by Nauru, the present added value of these two Funds would finance three times over the cost of rehabilitation as it was estimated in 1987 by the Nauruan Commission of Inquiry (Preliminary Objections of Australia, Vol. II, Ann. 26, p. 195).

And a second and even larger source of funds was the complete and gratuitous transfer of the phosphate operation. For we must not forget that Nauru continued the same form of phosphate exploitation and even duplicated it, thus indulging in what it dramatically describes as "the physical destruction of the homeland".

The stream of profits resulting from this exploitation between July 1967 and today has been estimated to have a value in present dollars which would finance four times over the 1987 Nauruan estimate of the cost of rehabilitation of the area mined before 1967 (Preliminary Objections of Australia, Vol. II, Ann. 26, pp. 189 and 195).

In its Written Statement (at para. 62, p. 21), Nauru tacitly admits that these two sources of revenue — the Trust Funds and the phosphate industry — are largely sufficient to finance the rehabilitation of all the worked-out land; it limits itself to characterizing this fact as irrelevant and beside the point.

How can it be irrelevant, Mr. President and beside the point, when it confirms the Australian position? Again, that position is that the Administering Authority's responsibility was and is limited to the question whether sufficient funds were left with the Nauruans upon independence, so as to finance the rehabilitation of the one-third of phosphate lands which were mined-out during the Mandate and the Trusteeship.

CONCLUSION

In our submission, the unanimous adoption of resolution 2347, including the affirmative vote of the three States composing the Administering Authority, in terminating the Trusteeship Agreement also settled "through the normal processes of the trusteeship system" all the issues which had been in dispute between Nauru and the Administering Authority, as well as any additional grievances which have been brought by Nauru before the Court.

This full discharge comprises not only the four disputes we have identified but also the other grievances advanced by Nauru in its Memorial concerning the furnishing of information as to the phosphate prices; the generic allegations of maladministration of the Trusteeship; of expropriation without compensation; of denial of justice and abuse of rights; in sum all the complaints denounced in the Memorial. All these issues have been settled by "other means", that is to say, by and within the United Nations organs competent to supervise the performance of the Trusteeship Administration and competent to solve all the disputes which may arise from the allegations of maladministration of a trusteeship.

The provisions contained in the General Assembly resolution 2347, and those it omitted, were based on the premise that the Administering Authority had satisfactorily discharged all the obligations it had undertaken in respect of the Trust Territory and its people, as well as towards the United Nations, culminating with the most important one of having led the Trust Territory to full independence, without a drop of blood.

These considerations find support — I invoke the support of the separate opinion of Judge Wellington Koo, one of the architects of the Trusteeship regime at the San Francisco Conference. In the *Northern Cameroons* case, which, of course, is different from the present one, Judge Wellington Koo concluded nevertheless, on the absence of jurisdiction of the Court, on the basis of an objection similar to the one we are advocating, the exception of "other means of peaceful settlement". That preliminary objection had been raised in the *Northern Cameroons* case by the Attorney-General of the United Kingdom, adducing, like Australia is doing now, that the dispute had been settled by "other means", those other methods being and I quote from the Attorney General's statement "the machinery of debate and decision of the General Assembly" (*I.C.J. Pleadings, Northern Cameroons*, at pp. 261 and 294-300).

Judge Wellington Koo asserted that a resolution of the General Assembly terminating a Trusteeship Agreement

> "in settling the whole matter of the Trusteeship . . . by necessary implication and effect, has also settled the dispute between the present Parties. This settlement thus fulfils the condition of exclusion from the scope of Article 19 prescribed by the terms 'settled . . . by other means'." (*I.C.J. Reports 1963*, pp. 51-52.)

In the present case, the disputes were solved through methods different from judicial settlement. The controversies were handled and settled by continuous negotiations, supervised and directed by the competent United Nations organs, their action and pressure amounting to the exercise of the peaceful methods of mediation and conciliation, combined with investigations and enquiries conducted by Visiting Missions and expert committees. These were "other peaceful means of [the parties] own choice", to borrow the terms of Article 33 of the Charter.

In the light of these facts and these precedents, it is submitted that the settlement reached in this case meets the conditions of exclusion from the Australian declaration of acceptance of compulsory jurisdiction. The dispute is one "which the Parties thereto have agreed to have recourse to some other method of peaceful settlement" and have so agreed, on their own accord and by their own conduct. The exercise of these "other methods" has culminated in the solution of the disputes.

I have arrived at the end of my statement. I wish to thank you Mr. President, distinguished Members of the Court, for your patience and attention.

ARGUMENT OF MR. BOWETT

COUNSEL FOR THE GOVERNMENT OF AUSTRALIA

Mr. BOWETT: Mr. President, Members of the Court.

I. INTRODUCTION

It falls to me to discuss the termination of the Trusteeship. Specifically, the issue is this: did the termination of the Trusteeship Agreement also terminate the particular liability for breach by Australia, which is the basis of the present claim?

Australia argues that it did. Australia also argues that this is an issue of admissibility which the Court must properly address at this stage. Nauru contests this. Nauru argues that this is a question which does not have an "exclusively preliminary character" (paragraph 203 of Written Statement), so that it need not be addressed at this stage.

But, Mr. President, if this particular claim of breach was terminated in 1967, so that the claim cannot lie, what would be the point of proceeding with months of written pleadings on the merits of the claim, followed by days, or even weeks, of oral argument? That could scarcely be a profitable use of the Court's time or even of the Parties' time. So, in my submission, the question whether such a claim now exists at all is very much a preliminary issue, properly and necessarily taken at this stage.

1. The Nature of the Nauruan Claim

It is of the utmost importance to grasp the essential nature of the Nauruan claim. It is a claim of maladministration of the Trust territory, a claim of breach in relation to administration. Essentially, it is the claim that Australia was in breach of the Trusteeship Agreement by failing to rehabilitate the island prior to 1967. Nauru cites specifically breaches of Article 76 of the Charter, and Articles 3 and 5 of the Trusteeship Agreement in the first of its submissions. It is in Article 5 of the Trusteeship Agreement that precise obligations are formulated.

So, we are not concerned with the obligations which the Administering Powers assumed towards the United Nations as such — obligations of report, supervision and control — or obligations owed to Member States generally: we are concerned only with obligations owed to the people of Nauru under a system of administration controlled and supervised by the United Nations.

Nor are we really concerned with obligations outside the Trusteeship Agreement. It is true that Nauru in its submissions seeks to invoke obligations of international law outside the Trusteeship Agreement. But, as the Court well knows, there are real difficulties in assuming that apart from the Treaty, international obligations were owed to non-State entities such as the people of Nauru prior to independence. Moreover, where States are bound by quite specific treaty obligations, as in this case, there is little point in invoking such general concepts as self-determination, permanent sovereignty, denial of justice and abuse of rights. For the United Nations Charter and the Trusteeship Agreement involved specific treaty obligations covering precisely the same ground as the general concepts in relation to the actual situation. The precise Trusteeship Agreement obligations were intended to be *the* operative obligations, based upon these more general concepts but spelling out their specific application to the case of Trusteeship. It was never supposed that by reference to such general concepts *additional* obligations were assumed, or that, conversely, the Administering Powers might acquire grounds justifying non-performance recognized in general international law but finding no place in the United Nations Charter or the Trusteeship Agreement. No, the only role these general concepts would have would be to give guidance in the interpretation of the Trusteeship Treaty provisions in case of ambiguity. But Nauru alleges no such ambiguity but rather attempts to construct quite separate legal obligations on the basis of these concepts, and that simply cannot be done.

Thus, I would submit to the Court that, in reality, we have here a claim for breach of specific obligations of administration imposed by the United Nations Charter and the Trusteeship Agreement.

What, then, is the consequence of this conclusion? The consequence lies in the following proposition:

2. Such a Claim Lay Exclusively within the Jurisdiction or Competence of the Trusteeship Council and General Assembly

It can scarcely be doubted that, so long as the Trusteeship Agreement lasted, a claim by the people of Nauru that there had been a breach lay, exclusively, with the competent organs of the United Nations — the Trusteeship Council and General Assembly.

The International Court was *not* competent to deal with this particular claim during the currency of the Trusteeship Agreement, if only because Nauru was not a State, and had no *locus standi* before the Court.

Australia does not argue that the Assembly's competence was exclusive of the International Court in all cases. Obviously, the system of protection provided by the Charter and the Trusteeship Agreement envisaged an important role for the Court. It could be used by the Assembly to give legal advice in the form of advisory opinions. Or it could be used by a Member State in a contentious dispute with a State administering the territory, under the provisions of certain trusteeship agreements — although not this one. The very fact that this Agreement, unlike some of the other Trusteeship Agreements, and indeed, unlike the earlier Mandate Agreement for this same territory, contained no provision for reference to the International Court of Justice of disputes between Member States and the Administering Authority is itself significant. It tends to confirm the view that the Trusteeship Council and General Assembly were regarded as exclusively competent.

So, Australia does not argue that the Court's competence was excluded in all cases. It argues only that, *for this specific claim*, the Court had no competence during the currency of the Trusteeship Agreement.

But, competence aside, the interesting question — indeed, perhaps *the* most interesting question is, was such a claim of breach ever made? Mr. President, it was not. It may strike the Court as extraordinary that at no stage did Nauru ever put its claim to rehabilitation of the island clearly and expressly in terms of *a breach* of the Trusteeship Agreement.

3. No Express Claim of Breach Was Ever Made to Either the Trusteeship Council or General Assembly

Now certainly the issue of rehabilitation was discussed — on several occasions especially after 1964 when the Nauruans themselves rejected resettlement and turned their attention to rehabilitation. But so were many issues of policy. And we need to keep in mind that the Charter and the Trusteeship Agreement phrase the obligations of the Administering Authority in terms of the result to be achieved. But any breach lies, essentially, in the failure to achieve the *objectives* of Article 76 of the Charter.

But the *means* or policies adopted to achieve those objectives are quite another matter. As to the objectives to be achieved, the Administering Authority has no discretion, for these objectives formed specific treaty obligations. But the means or policies adopted to achieve those objectives were quite another matter, and as to these the Administering Authority had a large measure of discretion. These means and policies were certainly subject to report, to discussion and recommendation. Thus, the General Assembly's resolution of 21 December 1965 was merely a *request* "that immediate steps be taken by the Administering Authority towards restoring the island of Nauru for habitation" (para. 4).

It was a recommendation as to *means* only. So, too, with the resolution in the following year, on 20 December 1966: it was a *recommendation* to "take immediate steps, irrespective of the cost involved, towards restoring the island of Nauru for habitation . . ." (para. 3).

And the very fact that, on rehabilitation, the Assembly confined itself to a mere recommendation is a sure indication that this was a matter of policy, over which the Administering Authority had discretion. Had it been a matter of the binding objectives of the Trusteeship, the Assembly would have used mandatory language. A breach would arise only when the Administering Authority failed to meet the prescribed objectives. And no finding of breach was ever made, by either the Trusteeship Council or the General Assembly, because no allegation of breach was ever made, and neither the Trusteeship Council, nor the Assembly ever considered that there had been such a breach.

This is an important point. So important, in fact, that it is worthwhile briefly recapitulating the reactions to the rehabilitation issue in these two organs. And, at the same time, we can see exactly why it never occurred to these two organs to characterize the conduct of the Administering Authority on this matter as a breach.

As you have heard earlier, the initial assumption by all parties was that the long-term solution lay in resettlement, *not* rehabilitation of Nauru itself. In 1953 the United Nations Visiting Mission saw resettlement elsewhere as the only feasible solution. Even as late as 1962 United Nations Visiting Missions regarded rehabilitation as impractical.

The *volte-face* by the Nauruans themselves in 1964, in deciding against resettlement, could not alter the practicalities. The CSIRO Inquiry in 1951 had rejected the practicality of widescale rehabilitation, so had the CSIRO report of 1965, and this view was later confirmed by the independent Davey Committee's Report in 1966.

It is scarcely surprising, therefore, that General Assembly resolution 2111 (XX) of 21 December 1965 did *not* find that failure to rehabilitate the land was a breach. It merely requested that "steps be taken . . . towards restoring the island for habitation".

And steps were taken. Just as they were taken in response to the similar resolution in the following year, resolution 2226 (XXI) of 20 December 1966. The steps taken were not, of course, to immediately start rehabilitation. For the technical evidence suggested this to be impractical on any large-scale, and, in any event, no rehabilitation scheme could be completed within the two years prior to independence.

So the steps taken were essentially two. First, to have the Committee of Experts, the Davey Committee, examine the practicality of rehabilitation once more. And, second, much more important, to conclude the 1967 Agreement for the transfer of the entire Phosphate Industry to the Nauruans, on such financial terms as to ensure that, if it so decided, Nauru could undertake rehabilitation after independence. Nauru was to be given the financial means to make its own choices. The Trusteeship Council accepted that these two new, and important, measures were steps which responded to resolution 2226. The Trusteeship Council's Report for the period July 1966 to June 1967 (A/6704, Annex 28, Australian Preliminary Objections) noted these steps with approval.

The United Nations had full knowledge of what was being done — and that is precisely why no further requests or recommendations were addressed to the Administering Authority on this matter of rehabilitation.

Consider the state of knowledge of the United Nations General Assembly, when it met in 1967:

- The Davey Committee Report, pessimistic as to the practicality of rehabilitation on a large scale, was known.
- The terms of the Canberra Agreement of 1967 were known.
- The Trusteeship Council, meeting in June 1967, had not repeated any request for rehabilitation by the Administering Authority.
- The Fourth Committee of the General Assembly, meeting in June 1967, had rejected a Liberian proposal to require the Administering Authority to undertake immediate rehabilitation.

On 22 November 1967, Mr. DeRoburt had addressed the Trusteeship Council in the following terms:

> "full agreement had been reached between the Administering Authority and the representatives of the Nauruan people. There was one subject, however, on which there was still a difference of opinion — responsibility for the rehabilitation of phosphate lands . . . That was not an issue relevant to the termination of the Trusteeship Agreement, nor did the Nauruans wish to make it a matter for United Nations discussion . . ." (Trusteeship Council, *Official Records*, 13th Special Session, p. 3.)

Mr. President, that was a remarkable statement. Not only did it fail to allege any breach of trusteeship, but it stated explicitly that this issue — the issue of responsibility for rehabilitation — was neither relevant to termination of the Agreement, nor even an appropriate matter for United Nations discussion. The effect of this statement on the Member States of the United Nations must have been considerable. If anyone had previously entertained private thoughts about breach, they were surely dismissed once this statement was made.

Then, on 6 December 1967, in the Fourth Committee, Mr. DeRoburt made a further statement. He said:

> "land would have to be rehabilitated . . . The revenue which Nauru had received in the past and would receive during the next 25 years would, however, make it possible to solve the problem." (1739 Mtg. A/C4/SR.173, p. 395.)

Note that he says "the problem". Not just that part of it which might arise from mining after independence. He is clearly referring to the existing problem, the pre-independence mining. And he assured the Fourth Committee that, under the terms of settlement embodied in the Canberra Agreement, Nauru was assured of sufficient funds to solve the problem.

Small wonder, then, that in the knowledge of all these facts, and given the assurances by Mr. DeRoburt, the General Assembly on 19 December 1967 terminated the Trusteeship unconditionally. With not a word about any breach by the Administering Authority; and not a word about any continuing responsibility for the costs of rehabilitation, even though, beyond question, the Assembly had the power both to determine the breach and allocate responsibility.

Of course, Nauru now tries to obscure this clear record. Nauru argues that, in its Preamble, the resolution on terminating the Trusteeship referred back to the resolutions of 1965 and 1966. And so it is argued, by Nauru, that the Assembly maintained the view that a continuing responsibility for rehabilitation existed.

Mr. President, this is sheer wishful thinking. As my colleague, Professor Aréchaga, has just shown you, the reference in a Preamble to early resolutions in United Nations practice is simply a way of recalling the history of the matter. The omission of any reference to a continuing duty, or responsibility, to rehabilitate was quite deliberate: the rejection of the Liberian proposal in the Trusteeship Council in 1967 is sufficient evidence of that. The reason why the Assembly made no reference to any such responsibility lies in the state of mind of the Assembly. As I have just indicated, given that the Assembly knew of the Canberra Agreement, and knew of the assurances given publicly by Mr. DeRoburt, it would have been astonishing if the Assembly had done otherwise.

So, the conclusion is clear. There was no express allegation of breach, and no finding of breach by any United Nations body.

This record also makes one further point abundantly clear, and that is that Nauru did not allege any breach for the simple reason that Nauru did not believe that the Assembly would be likely to find that there was a breach.

No other construction can be placed upon Mr. DeRoburt's statement that the remaining difference of opinion between Nauru and the Administering Authority over responsibility for rehabilitation was not a matter for United Nations discussion, or a matter relevant even to termination. That could only mean that Nauru did not regard this difference of opinion as likely to appear to the Assembly as a breach. It is impossible to justify the proposition that a breach of the Trusteeship Agreement — for that is what Nauru alleges — is not appropriate for United Nations discussion. The notion is patently absurd. It makes sense only if you accept that in 1967 Nauru did not believe it could convince the Assembly that any breach had occurred.

The idea that a breach had occurred, but that this was not an appropriate matter for United Nations discussion, is totally unacceptable. After all, the whole apparatus of supervision, the questionnaires, the reports, the visits, the petitions, was designed to ensure that breaches of the Trusteeship Agreement did not occur, or that if they did they were detected, discussed and censored by the United Nations. Breaches were, above all else, the concern of the United Nations. So the fact that Nauru did not allege a breach can mean only one thing: right up to the termination of the Trusteeship, Nauru did not believe that there had been a breach of the Agreement. There was a difference of opinion over who should bear the cost of rehabilitation of the lands — the lands worked prior to 1967 — but not a breach of the Agreement.

The Court rose at 1 p.m.

SECOND PUBLIC SITTING (12 XI 91, 10 a.m.)

Present: [See sitting of 11 XI 91.]

Professor BOWETT: Mr. President, Members of the Court, when I addressed you yesterday I had submitted three propositions: first, that Nauru's claim was essentially a claim for breach of the Trusteeship Agreement; secondly, that such a claim lay exclusively within the competence of the Trusteeship Council and the General Assembly; and, thirdly, that no such claim of breach was ever made to either body and no finding of breach was ever made by either body.

4. Is the Termination of the Trusteeship Agreement by the General Assembly, without Any Finding of Breach, Conclusive for the Parties?

If, therefore, there was no finding of breach by any competent United Nations organ when the Trusteeship Agreement was terminated, the question then arises, does this conclude the matter? In other words, was Nauru thereafter precluded from contending that there was a breach?

Prima facie, one would assume that where the General Assembly discharges an Administering Authority from its obligations under the Agreement — unconditionally and without any reservation as to future liabilities — that discharge is definitive. That must be the basic assumption. The act of discharge, unconditionally and without reservation, implies an acceptance by the Assembly that the Administering Authority has fully discharged its treaty obligations.

And, if that is so, it would be an extraordinary situation if a Member State — especially the former Trust Territory — could subsequently challenge that definitive, unconditional discharge by alleging a breach.

Certainly such an extrardinary situation was not contemplated by the Court in the *Northern Cameroons* case. The Court referred to the Assembly's resolution on termination as having "definitive legal effect" (*I.C.J. Reports 1963*, p. 32). Moreover, the Court took the view that a Member State's right under the Trusteeship Agreement, to invoke the jurisdiction of the Court in order to challenge the legality of acts of the Administering Authority would be at an end. It would not survive as the sole means of challenge, when all the other forms of supervision were terminated. The only exception would be where a Member State sought a remedy in the Court for injury to itself, or to its nationals, presumably because the remedy would be for a wrong lying outside the Trusteeship Agreement.

The general principle was aptly stated by Judge Wellington Koo, in a separate opinion, in these terms:

> "when the ultimate objective of a Trust is attained, and the particular Trusteeship Agreement is terminated, all questions relating to the Administering Authority's observance of the obligations thereunder are obviously intended to have been settled also" (at p. 61).

In order to test this hypothesis — the hypothesis of the conclusiveness and finality of the Assembly's resolution on termination — it may be useful to contemplate what the position might have been, had Nauru alleged a breach.

Let us assume the Trusteeship Council and the General Assembly rejected the allegation and found that there was no breach. Would not that have ended the matter? Would it have been possible for Nauru to wait until after independence, and then come to this Court to argue that the General Assembly was wrong, that it did not have exclusive jurisdiction, and that the Court was competent to find that a breach had occurred?

Surely not, Mr. President! In the *Northern Cameroons* case, the Court noted that counsel for the Republic of Cameroon had expressly stated that:

> "Cameroon is not asking the Court to criticize the United Nations; Cameroon is not asking the Court to say that the United Nations was wrong in terminating the Trusteeship . . ." (*I.C.J. Reports 1963*, p. 33.)

Although the Court did not, therefore, have to decide the issue, since it was not asked, the tenor of the judgment leaves little doubt that the Court would have refused to find that the United Nations was wrong. This is confirmed by the Court's Opinion in *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*, in 1962, where the Court emphasized that, unlike courts in most national systems of law, it had no power to review the validity of legislative or governmental acts (*I.C.J. Reports 1962*, p. 168). The same point was made in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (*I.C.J. Reports 1971*, p. 45), where the Court acknowledged that it had no powers of judicial review over General Assembly resolutions.

So, we can safely assume that, had the issue of breach been expressly put to the United Nations in 1967, and the allegation rejected, it would not now be open to Nauru to challenge that rejection before this Court. The question is, therefore, should Nauru be in a better position 24 years later, because it failed to make that challenge in the appropriate United Nations bodies in 1967?

If the challenge had been made, and breach alleged, the General Assembly certainly had power to decide on the question of breach. That much is clear from the Assembly's finding of breach in relation to South-West Africa, a mandated territory: *a fortiori* the power to decide on a breach of Trusteeship must reside in the Assembly. This is confirmed by the Court's *dictum* in the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* case:

> "it would not be correct to assume that because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting, in specific cases within the framework of its competence, resolutions which make determinations or have operative design" (*I.C.J. Reports 1971*, p. 50).

And, of course, in the *Namibia* case the Court totally rejected the argument that, being a political organ, the General Assembly was not competent to act judicially and make a finding of breach. That view would, in the words of the Court, "amount to a complete denial of the remedies available against fundamental breaches of an international undertaking" (para. 102). If that is true of breaches of a mandate, it must certainly be true of breaches of trusteeship.

Moreover, the Assembly had extensive powers to deal with such a breach; it could call upon the Administering Authority to remedy the breach. It could delay terminating the Agreement until the breach had been remedied, or it could terminate the Trusteeship with an express proviso that the Administering Authority remained liable for all the financial consequences of the breach or even an express proviso that the matter of responsibility remained to be decided after independence.

It is not unknown for the General Assembly to recognize expressly that there are outstanding problems or disputes to be resolved after independence. For example, in 1949 by resolution 289 (IV) of the Fourth Session, the Assembly recommended independence for Libya not later than 1952. But it knew there were boundary problems, and so it called on the Interim Committee to study them meanwhile. This study revealed that the southern boundary of Libya was in dispute. Accordingly, by resolution 392 (V) of the Fifth Session of 15 December 1950, the General Assembly called on France and Libya to negotiate and resolve this problem after independence.

But this did not happen in the case of Nauru. There is no finding of breach, and not even a recognition by the Assembly that an issue of responsibility remained to be decided after independence. The General Assembly's resolution appears as final and definitive. So we are back to the question: why should Nauru be in a better position, 24 years later, because it failed to make any allegation of breach in 1967?

The answer is surely that it should not. There is no reason why a delay of 24 years should strengthen Nauru's case which it now brings before this Court. Nor is it possible for Nauru to argue that the "finality" of the Assembly's termination of the Agreement does not extend to a final disposition of the claim of breach, because Nauru made no such claim in 1967, and therefore the Assembly did not deal with the question.

No, Mr. President, the fact is that the Trusteeship Committee and the General Assembly were fully aware of the Nauruan claim, and of all the facts on which that claim rested. But the way in which the Assembly dealt with the claim changes dramatically once the terms of the Canberra Agreement were known, and Mr. DeRoburt assured the Assembly that, by virtue of that Agreement, Nauru would have at its disposal all the financial means to solve the problem.

So the issue was addressed by the Assembly and was fully embraced within the overall finality of the Assembly's termination of the Agreement, and all matters of responsibility arising from that Agreement. It cannot be right to allow Nauru to re-open the matter now, on the basis of an allegation of breach it never saw fit to make to the Assembly. And there are various arguments to support this conclusion.

There is first the argument of exclusivity. If, as we have demonstrated in relation to this type of claim, the General Assembly was exclusively competent during the currency of the Agreement, why should that exclusivity be now denied simply because Nauru waited until 24 years after the Trusteeship had been terminated?

Second, there is an argument based on the range and effectiveness of the remedies for any such breach. As I have explained, the Assembly had various options available to it in dealing with any breach, both political and legal. The Court has more limited options, given that the Agreement is terminated.

Third, there is an argument about authority. For if this Court were now to decide that there was in fact a breach by reason of the failure to rehabilitate the mined lands, does this not reflect upon the authority — even the competence — of the General Assembly? After all, the General Assembly had at its disposal the whole apparatus of supervision — the questionnaires, the reports, the system of petitions, the Visiting Missions, the facility for questioning the Administering Authority within the Trusteeship Council — so that if there was a breach why did not the Trusteeship Council or the General Assembly detect it? It is no answer to say that Nauru did not complain of any breach. Because the elaborate system of supervision was designed to safeguard the Trusteeship system against breaches, quite independently of whether the inhabitants of the territory complained of a breach. And, in any event, the issue of rehabilitation was out in the open from 1964 onwards, so the problem was one of judgment, not one of detection.

The Trusteeship Council and the General Assembly were well aware of the difference of opinion between the Nauruans and the Administering Authority over this question of rehabilitation. So, if there was a breach, why did not the General Assembly declare that there was a breach?

The Court will see that if it now proceeds to find there was a breach, this would constitute the most damning indictment of the Trusteeship Council and General Assembly. It will amount to an accusation of either incompetence or bias. If the substance of Nauru's case were correct, the United Nations itself would be responsible for a total failure to exercise adequate supervision amounting to collusion in the allegedly wrongful activities of the Administering Authority. Indeed, misdeeds on the scale of those alleged could only have been possible with the tacit approval of the United Nations and ultimately, at the end of the Trusteeship, with its condoning of the activities of the three Administering States in the performance of their functions. A finding in favour of Nauru would diminish the authority of the General Assembly.

Fourth, there is an argument about finality. From the point of view of the United Nations, the act of terminating a trusteeship ought to be an act of finality. It brings to an end the whole system of supervision and discharges from further obligations the Administering Authority. The final resolution of 19 December 1967, resolution 2347 (XXII) is in unqualified terms: it welcomes the achievement of full and unqualified independence. There is a false note introduced into this ostensibly final act if you then postulate the possibility that, years later, one United Nations organ — the Court — may re-examine the record to see whether breaches, which ought to have been identified and censured by the Assembly, were in fact committed.

Nauru attempts to oppose the finality of the General Assembly's action in terminating the Trusteeship by pointing to the Assembly's treatment of Namibia (Written Statement, p. 80). And, of course, it is true that the Assembly continued to hold South Africa responsible for usurpation of the rights of the people of Namibia to the natural resources of the territory after the Mandate had been terminated.

But, Mr. President, the argument is little short of ludicrous. The Mandate for South-West Africa was terminated because there was a fundamental breach and South Africa continued to be responsible because it continued in unlawful possession.

Here we have a totally different situation. There is no finding of breach and the Administering Authority handed over the territory as required. Thus the presumption must be one of finality, of a complete discharge by the Assembly, granted to the Administering Authority.

From the point of view of the Administering Authority, the need for finality is even greater. It seeks an absolute, unconditional discharge from its obligations under the Trusteeship Agreement. And there can be no question but that, on the basis of the resolution adopted by the Assembly in 1967, the three Administering Powers believed that they had been given such a discharge. This is why, in 1969, they refused to enter into discussions on rehabilitating land for the construction of a new airstrip (see Nauru Memorial, Annexes, Vol. 4, Anns. 76 and 77); and why, in 1984, they again refused to re-open the rehabilitation issue (Anns. 78 and 79).

There is an element of unfairness in seeking to impose a legal responsibility on the Administering Authority for breaches of an Agreement, some 24 years after being discharged from their responsibilities under that Agreement. For, this is not some new issue of responsibility which has come to light only 24 years afterwards. This is exactly the same issue as was discussed and fully known to all the Parties — including the General Assembly — before the termination was effected.

II. WAIVER OF THE CLAIM

Mr. President, I now turn to address the question whether, assuming Nauru to have had a valid claim for breach, that claim was in fact waived. Obviously, we reach this question only if the Court rejects my previous argument and decides, contrary to Australia's submission, that Nauru had a valid claim for breach, which was not extinguished by the termination of the Trusteeship Agreement. On that hypothesis, the question remains: was such a claim, in any event, waived by Nauru?

We have to examine the waiver in two rather different contexts. There is first the question whether, in the context of Nauru's negotiations with the three Partner Governments, leading to the Canberra Agreement of 1967, Nauru in fact accepted the terms of that Agreement as a final settlement. Obviously, if that is so, the acceptance of the Canberra Agreement by Nauru constituted an implied waiver of its previous claim on rehabilitation. Second, there is the question whether, after the signing of the Canberra Agreement, Nauru in effect signalled to the General Assembly that it waived its claim. I will examine these two contexts separately, and in that order.

1. Waiver vis-à-vis the Partner Governments

From 1966 onwards, the Partner Governments were under increasing pressure within the United Nations to move towards independence for Nauru as quickly as possible: General Assembly resolution 2226 (XXI) of 20 December 1966 recommended 31 January 1968 as the latest date.

Given the lateness of the Nauruan people's decision not to resettle, but to stay on Nauru itself and, given further, the repeated technical reports that large-scale rehabilitation was not practical, you can see that the Partner Governments were not themselves prepared to contemplate rehabilitation. They did not believe it to be feasible, or to make good economic sense, and they did not have time enough to do it prior to independence, in any event.

They took the decision, therefore, that it should be left to the Nauruans to decide for themselves whether to rehabilitate or not. They, the Partner Governments, would transfer the ownership and control of the phosphate industry to the Nauruans. And the terms of the transfer would be such that the Nauruans would be guaranteed sufficient financial resources, not only to maintain a high standard of living, but also — if they so chose — to rehabilitate the island. But it was to be for the Nauruans to decide and to do. The Partner Governments accepted no responsibility for rehabilitation. They would make sure the Nauruans had all the necessary finances, but there the responsibility of the Partner Governments ended.

This position emerges clearly from the records of the discussions in 1966-1967. And it is important to trace through the positions of the two sides in the records of those discussions. Nauru has provided those records in Volume 3 of its Annexes. They have to be examined carefully to see whether Nauru did, or did not, waive its claim.

Now, in June of 1966 the Partner Governments stated their position in a formal statement on behalf of the Joint Delegation:

> "this Delegation [the Joint Delegation] would envisage that the project level of receipts by the Nauruan community should be discussed from the point of view of building up a long term fund adequate for the long term security of the Nauruan people and adequate also . . . for making appropriate and practicable provision for the rehabilitation of Nauru if that remains the definite objective of the Nauruan people" (Annex 4, p. 386).

Note that this clearly referred to rehabilitation of the lands already mined, pre-independence. This position was reiterated in July 1966. And, at this stage, the Nauruans seemed to agree. The Agreed Minute of the meetings between 14 June and 1 July 1966 sets out the Nauruan position in the following terms:

> "The Nauruan view was . . . that they should receive the full financial benefit from the phosphate industry, so that there would be funds available to rehabilitate the whole of the island." (*Ibid.*, p. 407.)

Clearly, the Nauruans were referring to the areas mined pre-independence and they were assuming that they, the Nauruans, would be responsible for all rehabilitation. But over the next few months a significant change occurred in Nauruan thinking, and they decided that they would hold the Partner Governments responsible for rehabilitating areas mined pre-independence. In the record for the meeting on 20 April 1967 there is noted a statement by the Nauruans that they accepted responsibility for rehabilitation in respect of future mining, post-independence, but not past mining. The reply of the Partner Governments was clear and categorical. It was the Nauruan's decision not to resettle elsewhere, and, in the words of the Secretary, speaking on behalf of the three Partner Governments:

> "it was the view of the Partner Governments that decisions regarding rehabilitation were also matters for the Nauruans, and that the Partner Governments' proposals in respect of the financial arrangements provided adequate means to carry out whatever redevelopments of the mined areas might prove to be necessary" (Annex 5, p. 81).

And that seemed to be that. The proposals of the Partner Governments on 10 May 1967 (Joint Delegation 67/2) repeated that:

> "the Partner Governments consider that the proposed financial arrangements on phosphate cover the future needs of the Nauruan community including rehabilitation or resettlement" (*ibid.*, p. 160).

For this reason, the Partner Governments sought to persuade the Nauruans to withdraw their claim. The record for the meeting on the morning of 16 May states that: "the Joint Delegation would like to see the Nauruans withdraw their claims in respect of rehabilitation" (*ibid.*, p. 56).

But evidently the Nauruans at this stage were not prepared to do so. This is clear from the record for the afternoon meeting on that same day, for that states that the Nauruans would still maintain their claim on the Partner Governments in respect of rehabilitation of areas mined in the past.

Thus the Nauruans were claiming that the Partner Governments should meet the cost of rehabilitation of areas mined pre-independence. They had abandoned the idea that they would themselves assume the responsibility, provided their revenues were adequate.

But let us note two further things. The Nauruan claim is against "the Partner Governments", not just Australia. And there is no hint that the Nauruans viewed this claim, this responsibility, as deriving from the Trusteeship Agreement.

However, no more is heard of the Nauruan claim, and the Canberra Agreement on the Transfer of the Phosphate Industry was duly signed on 14 November 1967. It contained not a word about rehabilitation.

But it did, as the Partner Governments had promised, make rather generous financial provision for the Nauruans. They could look forward to US$21 million income for 1968, that is to say $40,000 per annum for each family, over and above whatever they might earn for themselves. If, from this total income, the Nauruans maintained the existing level of contributions into the long-term fund, this would amount to $400 million by the time the phosphates were exhausted. And if that sum were invested, they could anticipate around $24 million per annum, as an income from that investment.

So the Partner Governments had kept their promise. The financial arrangements were generous enough to enable the Nauruans to tackle the entire rehabilitation problem, if they so wished.

Clearly, the Partner Governments did not expect to hear any more of the Nauruan claim that they, the Partner Governments, should also bear the cost of rehabilitation. And they did not. From the middle of May until the signing of the Canberra Agreement on 14 November 1967 all was silence.

Now I would invite the Court to consider very carefully the implication of this five months of silence.

The Partner Governments had insisted throughout that they did not accept the Nauruan claim and that the financial terms they were offering were a sufficient discharge of any obligation the Nauruans might think they owed. That was the offer in the 1967 Agreement, and it was signed and accepted by Nauru. The question is, was that, or was it not, a waiver of the Nauruan claim?

Nauru says not. It argues in its written observations that, because the Agreement contained no waiver clause, therefore there was none.

But, of course, that cuts both ways. One could just as well argue that the Agreement contained no "without prejudice" clause, and that if the Nauruans did not agree that the Agreement was a comprehensive one, the onus was on them to say so, and to insist that the Agreement contained a clause preserving their claim. And the Agreement contained no such clause.

If you look at the transaction in terms of simple offer and acceptance, then there is no doubt that the Nauruans knew the Partner Governments were offering a comprehensive settlement. They knew that, if they again voiced their claim, the offer would be withdrawn, or at least reduced in value. So they kept their silence. They maintained that silence at the very time when, in good faith, they should either have reasserted their claim, or refused to sign the Agreement if it lacked a "no prejudice" clause. In the result, elementary considerations of good faith suggest that the Nauruans could not both accept the Agreement and renew their claim.

2. *Waiver vis-à-vis the United Nations*

Mr. President, that is precisely what they did. On 22 November, only one week after signing the Agreement, in addressing the Trusteeship Council, Chief DeRoburt said this:

> "There was one subject, however, on which there was still a difference of opinion — responsibility for the rehabilitation of phosphate lands . . . He merely wished to place on record that the Nauruan Goverment would continue to seek what was, in the opinion of the Nauruan people, a just settlement of their claims." (Annex 29 to Preliminary Objections of Australia.)

If that statement was intended to preserve the claims it was, in my submission, too late and addressed to the wrong audience. Any statement of preservation of claims had to be made before the Canberra Agreement was signed, not after. And it had to be made directly to the Partner Governments, not the Trusteeship Council.

In short, Mr. President, if one party accepts a comprehensive offer, so that an agreement is made with another party, that party cannot, by a unilateral statement a week later, in a different forum, revise the agreement. The waiver had been made, implicitly, on 14 November in Canberra. It could not be retracted on 22 November in New York.

It seems likely that these rather elementary propositions of good faith, and good sense, began to occur to Chief DeRoburt himself. For, at the crucial stage in the United Nations discussions, on 6 December 1967, Chief DeRoburt changed his position. He then said:

> "One [problem] which worried the Nauruans derived from the fact that land from which phosphate had been mined would be totally unusable. Consequently, although it would be an expensive operation, that land would have to be rehabilitated and steps were already being taken to build up funds to be used for that purpose . . . The revenue which Nauru had received in the past and would receive during the next 25 years would, however, make it possible to solve the problem." (Preliminary Objections of Australia, Ann. 30, para. 20.)

You will note that the "problem" he refers to is the whole problem of rehabilitation, not just that produced by post-1967 mining. And he speaks of this as a Nauruan problem. There is no mention, this time, of any continuing responsibility in the Partner Governments or of any claim against the Partner Governments.

Thus, at the crucial stage, when the Assembly has to vote on terminating the Trusteeship, the silence returns: and that can only be construed as a waiver of any claims. For that was the time to speak out, so that, if the Assembly agreed with the Nauruans in their claim of a continuing financial responsibility on the Partner Governments, the Assembly could record that agreement in its resolution. We would then have seen, not a complete discharge of the three Partner Governments from all their obligations as Administering Authority, but a qualified discharge. The resolution could have qualified that discharge by noting that there was this continuing responsibility. But nothing of this kind happened. And so, in Australia's submission, we are entitled to treat that statement on 6 December as a clear waiver. This was no mere "superficial inconsistency", as Nauru suggests, placing all the emphasis on the statement of 22 November. This was *the* principal statement by Nauru, before *the* principal organ, the General Assembly, at *the* critical point when the decision on termination had to be made. And it confirmed entirely the view of the Partner Governments that the Canberra Agreement was intended to be a complete and comprehensive settlement, was offered as such, and was accepted by Nauru as such.

III. THE UNREASONABLE DELAY IN THE PRESENTATION OF THE PRESENT CLAIM BY NAURU

The discussion of waiver leads me naturally into the third, and last, part of my presentation. Here I shall deal with the quite extraordinary delay in the presentation of this claim. It is this long delay which confirms the implication that any real claim had been waived long ago.

As Nauru says at paragraph 125 of its Written Observations: "It is generally accepted that delay may in the circumstances of the particular case constitute an implied waiver of the claim."

That is true. And so the question arises, how does Nauru explain this long delay — 24 years — except as a waiver of any claim it might have contemplated?

In effect, Nauru says only two things: first, that Nauru did renew the claim after independence, and, second, that in any event Australia has suffered no prejudice. Let me take those two arguments separately.

1. The So-called post-1967 Claims

Nauru refers to a letter dated 5 December 1968 (Nauru Memorial, Vol. 4, Ann. 76). The operative part of this letter was the following:

> "We are now concerned at the expansion of air services in the Pacific region and feel that if we remain inactive for too long, we may lose important opportunities for economic and communications development. This approach, therefore, is to request your concurrence and that of your Government and its Partners, New Zealand and the United Kingdom to a meeting with representatives of my Government to work out how best the airstrip could be constructed as a rehabilitation project and to determine the degree of financial and technical assistance the Partner Governments would be able to offer."

What can one make of this letter? The Court will note that this is not the previous rehabilitation claim. This is a request for financial and technical assistance to construct an airstrip. The rehabilitation element is purely incidental: rehabilitation is involved only in the sense that the airstrip will have to be on the mined areas, so filling in and flattening out of the land will be involved. The Court will also note that it is addressed not to Australia alone, but to the three Partner Governments. And the Court will note that there is no mention of any breach of the Trusteeship Agreement, or of any legal responsibility arising from that Agreement, or, indeed, of any legal responsibility of any kind. It is a request for financial and technical assistance, pure and simple.

The Australian reply (Ann. 77), having consulted the Partner Governments, was that those three Governments had made it clear in the talks prior to independence that they accepted no responsibility for rehabilitation as such, and that the terms of settlement agreed were sufficiently generous to enable Nauru to meet all its needs, for rehabilitation and development. But technical assistance could be offered.

Then Nauru refers to a visit by Mr. DeRoburt to Canberra in 1973, during which he raised the rehabilitation issue. The same thing happened ten years later in 1983 (see Annex 78). But, again, this was not raised as a legal claim. It was raised as "a matter of concern" to Nauru. And, again, there is no reference to any responsibility arising from the Trusteeship Agreement, and remaining undischarged by the termination of that agreement. And, again, Nauru got the same reply (Ann. 79).

Finally, in 1986, Nauru addressed identical Notes to the three Partner Governments — not just to Australia (Ann. 80). But this was not a claim of any sort. It was merely to notify the three Governments that Nauru was establishing a Commission of Inquiry, to enquire into the question of who had responsibility for rehabilitation. All it asked of the three Partner Governments was their co-operation in producing documents or information.

So, what conclusion must one reach? The fact is that no legal claim was ever presented post-independence. The conclusion must be, inevitably, that Nauru had waived that claim way back in 1967. Nauru knew it had accepted the Canberra Agreement as a final settlement. This is why Nauru waived the claim in addressing the General Assembly in December 1967. And that is why Nauru no longer referred to any legal claim, or any claim of right, in all the years from 1967 to 1991. This long delay in bringing proceedings in this Court simply confirms that the claim had been waived.

2. *The Lack of Prejudice to Australia*

But, of course, Nauru now says that the delay does not matter, because Australia has not been prejudiced by the delay. Let me deal briefly with this argument.

It must be obvious that if what is in issue is essentially a waiver, then prejudice does not enter into it. Either there was a waiver, or there was not. If there was a waiver, then the fact that Australia may not have been prejudiced by the long delay between the waiver and the bringing of this present case is beside the point. The waiver would remain valid.

But, in any event, Australia has in fact been prejudiced by this long delay in connection with these present proceedings. Nauru says this cannot be so because Australia has all the documents it needs. But the Court must be aware that the present claim of Nauru takes us back to the days of the Mandate — and Australia does not have all those documents. The British Government might, but Nauru has chosen not to make the United Kingdom a Party to these proceedings.

And there are more important matters of prejudice than documents. As I have indicated, any claim of breach of the Trusteeship Agreement ought to have been made in the United Nations, prior to termination. If it had been made, it would have been made against all three Partner Governments. It would have had to have been made against all three, because it is inconceivable that the General Assembly would have allowed only one of the three Administering Powers to be singled out as legally responsible for the obligations held jointly by all three.

Moreover, the Trusteeship Council or the General Asssembly would have dealt with the claim of breach, and either dismissed it, or held the three Governments accountable for the breach by reference to the standards of administration reasonably required at that time.

But look at the position now. Australia is sued alone. Nauru seeks to colour the issue of the legitimacy of the acts of administration by reference to current standards of environmental protection. And Australia can no longer seek a ruling on the charge of maladministration from the competent political organs: they now have no role, and so Australia may be forced to defend itself — on matters of political and economic judgment — before this Court. I mean no disrespect to this Court when I say that Australia does find that prejudicial. It is a burden Australia never expected to shoulder — alone, and 24 years after it had been discharged from all further obligations by an appreciative and grateful General Assembly.

So, Mr. President, for all these reasons Australia submits that this claim is inadmissible. It is too late, it is brought against the wrong respondent, and in the wrong forum: and the very tardiness of the claim confirms Australia's view that Nauru waived any claim long ago, and knows it.

Mr. President, that concludes my statement. I appreciate the patience of the Court and would ask you to call upon Mr. Henry Burmester.

ARGUMENT OF MR. BURMESTER

CO-AGENT FOR THE GOVERNMENT OF AUSTRALIA

Mr. BURMESTER: Mr. President, Members of the Court, it is a great honour for me to address the Court as Co-Agent for Australia. I had the honour to be associated with the previous case in which Australia appeared before this Court, some 17 years ago. Hence, it is an even greater honour that I am on this occasion able directly to address the Court, for which I have the greatest respect.

Mr. President, my submissions concern first Nauru's claim to the overseas assets of the British Phosphate Commissioners, and secondly, the issue of good faith.

As to the Nauruan overseas assets claim, Australia makes four submissions. Australia submits the claim is inadmissible because it was not first made in Nauru's Application, but was left to Nauru's Memorial. Secondly, Australia submits that, in any event, the claim does not arise from a legal dispute, within the meaning of Article 36 (2) of the Statute of the Court. Thirdly, Australia submits that Nauru can in fact show no legal interest in the overseas assets of the BPC. And finally, in relation to the overseas assets claim, Australia also relies on each of the submissions which it makes in relation to the other parts of Nauru's case.

I turn first to the facts. The British Phosphate Commissioners, commonly called the BPC, were appointed by Australia, New Zealand and the United Kingdom, under an Agreement made in 1919 and amended in 1923. We have already given an account of the Agreement in our written submissions (see paragraphs 24-31 and 131-135 of the Preliminary Objections). Under a further Agreement made in 1920, the BPC acquired a mining concession over the phosphate deposits on Nauru.

In 1967, just prior to Nauruan independence, the Nauruan assets of the BPC were sold to Nauru pursuant to the Canberra Agreement of that year (see paragraphs 95-107, and 136 of the Preliminary Objections). As we have already said, the terms of the 1967 Agreement were particularly favourable to Nauru.

Then, in 1987, some 20 years later, the three Partner Governments determined to wind up the undertaking of the BPC. Accordingly, pursuant to an Agreement between them, the BPC's remaining assets were distributed amongst the Partner Governments (Nauruan Memorial, Ann. 31). Subsequently, on 23 June 1988, there was an exchange of notes between the Partner Governments, under Article 5 (2) of the Agreement, confirming that all agreed steps had been taken and bringing the 1919 Agreement to an end.

The assets distributed in 1987 were derived from a number of sources. They, in fact, represented decades of trading by the BPC in phosphate, in shipping, and other activities. Some of the assets may have been derived from the proceeds of sale of Nauruan phosphate. Some may have come from the sale, in 1967, of the BPC's Nauruan assets to Nauru. However, much of the BPC's remaining assets came from elsewhere, and did not derive from Nauru at all. And this is clear from an examination of the 1987 Agreement itself. The Preamble emphasizes that in more recent years the BPC had been managing agents in relation to the mining of phosphate on Christmas Island, an Australian territory. It was because that function had come to an end that it was decided to proceed to wind up the affairs of the BPC.

I turn then to Nauru's claim.

This is a new claim. It did not appear in the Nauruan Application, but was left to the Nauruan Memorial. Nauru says, in effect, that the claim was wrapped up in its original Application, in the sense that its original Application concerned breaches of obligations relating to the Trusteeship Agreement.

Australia submits, however, that this cannot be accepted. An examination of the Nauruan Application, particularly Parts IV and V, shows the care and precision with which the Nauruan claims have been formulated. There is no reference to overseas assets. In its Application, Nauru challenged only Australia's failure to rehabilitate phosphate lands worked out before 1 July 1967. The relief sought in the Nauruan Application related only to this. Compensation for rehabilitation was the stated purpose of the Application.

The terms of Nauru's Application are consistent only with this interpretation. Presumably it was for this reason that Nauru referred to its unsuccessful efforts to get Australian recognition of the obligation to rehabilitate (Application, para. 40). It was also in keeping with this that Nauru drew attention in its Application to its appointment of a Commission of Inquiry into the rehabilitation of the phosphate lands. Everything in the Application indicates that the *fons et origo* of this case, to adopt an expression used in the *Nuclear Tests* case (*I.C.J. Reports 1974*, p. 263), is the claim for rehabilitation.

Yet, we now find, in the Nauruan Memorial a claim to what is termed "the Australian allocation" of the overseas assets of the British Phosphate Commissioners. This is clearly very different from a claim for rehabilitation.

Not surprisingly, Nauru has not shown any real connection between claims for rehabilitation and its claim to the overseas assets of the British Phosphate Commissioners. Nor, indeed, any connection between its claims to the overseas assets of the British Phosphate Commissioners and alleged breaches of the Trusteeship Agreement.

The fact is that the claim to the overseas assets of the British Phosphate Commissioners appears as an after-thought. Perhaps someone thought of it after the Application was lodged and said "let us add it to the original claim". Australia submits that this cannot be done. And this issue is not a matter of form only. It is a matter of procedural fairness, not only to Australia, but to third States as well.

The Rules of the Court are clear. Article 38 provides:

> "The Application shall specify as far as possible the legal grounds upon which the jurisdiction of the Court is said to be based; it shall also specify *the precise nature* of the claim, together with a succinct statement of the facts and grounds on which the claim is based."

I repeat, "shall specify *the precise nature* of the claim". In relation to the overseas assets claim, however, it is clear Nauru did not comply. There is not a single reference in the Application to the overseas assets of the British Phosphate Commissioners.

An important purpose of Article 38 is to give proper notice of claims to the immediate respondent, here Australia, *as well as* to other States whose interests may be affected. This is because, under Article 42 of the Rules, a copy of the Application is specifically required to be transmitted to "other States entitled to appear before the Court". An application (or notification of a special agreement instituting proceedings) is the only document which is required to be transmitted in this way.

Article 42 is clearly intended to protect the interests of States which may be affected by the proceedings. Once on notice, such States can determine whether or not to make application to intervene or to take any other action which may seem appropriate.

As Nauru's Application did not refer to its overseas assets claim, however, the transmission of its Application to other States would not have notified other States of the claim.

The possibility of prejudice in this case is far from fanciful. Together with Australia, the United Kingdom and New Zealand have each received a share of the assets held by the BPC. The interests of those two other States are also at stake. Indeed, this much has already been recognized by Nauru, in the diplomatic exchanges between it and all three Partner Governments (Nauruan Memorial, Ann. 80, Nos. 5, 6, 8, 9, 10, and 17). By failing to comply with the Rules of Court, Nauru has deprived two of the Partner Governments of the notice to which each was entitled.

Clearly, the Rules of this Court should not be applied so as to impair the rights of other States which are not parties to the proceedings. The Permanent Court, in the *Société Commerciale de Belgique* case, noted this specifically, in relation to the amendment of claims and submissions. The Court said:

> "It is clear that the Court cannot, in principle, allow a dispute brought before it by application to be transformed by amendments in the submissions into another dispute which is different in character. A practice of this kind is calculated to prejudice the interests of third States to which, under Article 40, paragraph 2, of the Statute, all applications must be communicated in order that they be in a position to avail themselves of the right of intervention provided in Articles 62 and 63 of the Statute. Similarly, a complete change in the basis of the case submitted to the Court might affect the Court's jurisdiction." (*1939, P.C.I.J., Series A/B, No. 78*, p. 173.)

Now Nauru argues for a liberal approach, but the result for which it contends is not supported by the authorities to which it refers. For Nauru cannot show that its claim to the overseas assets of the BPC is a claim implicit in, or consequential on, or arising directly out of, the original claim for rehabilitation. Nauru cannot, therefore, satisfy the tests referred to in the *Temple of Preah Vihear* case and the *Fisheries Jurisdiction* case — both cases mentioned by it in its written submissions (see paras. 350-351).

It is for these reasons that Australia submits that Nauru's claim to the overseas assets of the BPC is inadmissible, because it is a new claim, made contrary to the Rules of Court which are intended to ensure that proper notice is given not only to the Respondent but to non-party States as well.

A LEGAL DISPUTE

I turn to my second argument. Apart from the issue of procedural fairness, Australia also submits that, in any event, the Court has no jurisdiction under Article 36 (2) of the Statute, to deal with this claim. It says, first, that Nauru has not identified a *legal dispute* within the meaning of Article 36 (2). Secondly, it says that Nauru has not demonstrated a *legal interest* sufficient to support a valid claim.

For there to be a legal dispute, there must be first, a dispute in the legal sense, and secondly, it must be a dispute falling within one of the four categories set out in Article 36 (2).

In the *Mavrommatis* case (*1924, P.C.I.J., Series A, No. 2*, p. 11), the Permanent Court did define a dispute as "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons". But as later cases show a mere assertion of a disagreement is not sufficient. There must be something more. This much is clear from the recent *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* (*I.C.J. Reports 1988*, p. 27). In that case, the Court referred to the 1962 South West Africa case and said in substance that there will only be a dispute in the relevant sense if there is a claim by one party which is positively opposed by the other. This can only be determined by reference to the attitudes of the parties.

So let us turn then, Mr. President, to the diplomatic exchanges because in this case there have been no prior negotiations as a result of which the claim of Nauru can be seen to be positively opposed by the Partner Governments. In this case, the attitudes of the Parties must be determined by reference to diplomatic exchanges. And these are set out in the Nauruan Memorial (paras. 471-476) and in Australia's Preliminary Objections (Ann. 13). (Some parts of them are also set out at paragraphs 335 to 340 of Nauru's Written Statement.)

The subject was opened by Nauru in January 1987 when, in a Note of 5 January, Nauru wrote for information concerning the BPC assets and asked that it "be consulted in matters relating to [their] disbursement . . .".

Australia on 20 January 1987 confirmed that "arrangements are in hand" for winding up the BPC and indicated that the Partner Governments would shortly sign an agreement to bring this about. At the end of that month, and following Australia's reply, Nauru wrote again, expressing:

> "regret that the three Partner Governments are contemplating the winding-up of the British Phosphate Commissioners and distribution of their funds".

However, the Note did not go any further than "requesting" the three Partner Governments to keep the funds of the BPC intact and its records preserved until Nauru's Commission of Inquiry into land rehabilitation had completed its task.

Some months went by. Then in May 1987, the President of Nauru wrote to the Australian Prime Minister indicating that it was the "strong view" of the Nauruan Government that the assets of the BPC should be "directed towards" rehabilitation, but as the terms of that letter make clear, the Nauruan President was not making any specific claim. He wrote:

> "The Note [of 30 January 1987] to you and other Governments, however, was by way of an interim measure merely moving you to withhold distribution of assets until the report of the present independent Commission of Inquiry into the Rehabilitation of the Worked-Out Phosphate Lands of Nauru has been completed and published . . . The whole rehabilitation question is a most vexing problem. On this question, there appears to be a number of intangibles, and it is the belief of my Goverment that irrevocable stances should not be assumed by the various governments at the outset."

The Nauruan President did not take the matter much further. In his last letter, of July 1987, he wrote:

> "I find it difficult to accept [the Australian Government's statement] that the residual assets of the BPC were not derived in part from its Nauru operations. I shall not, however, pursue that here but leave it perhaps for another place and another time."

Now this last sentence in the letter, "I shall not, however, pursue that here . . ." indicates that there was no claim between Australia and Nauru that was positively opposed. Australia submits that none of this exchange adds up to a specific claim by Nauru to the overseas assets of the BPC which was positively opposed by the Partner Governments, including Australia. Furthermore, none of this indicates any basis on which a claim might have been made. On the contrary, the exchange amounts only to an expression of strong interest in the assets, on the basis, it was said, that they were derived from the BPC's Nauruan operations. This fact was denied by Australia. But no *claim* to the assets was in substance made until Nauru lodged its Memorial in this case. There is, therefore, no dispute in the legal sense revealed by the diplomatic exchanges.

Even if, contrary to my submissions, the Court were to find that there was a dispute concerning the source of the BPC's overseas assets, it does not follow that there is a *legal* dispute within the meaning of Article 36 (2) of the Statute.

For a dispute, in the legal sense, to exist there must, as I have indicated, be an opposition of views. To be a *legal* dispute the opposition must relate to a matter falling within Article 36 (2) of the Statute. But Nauru has not said that there is an opposition of views concerning any such matter.

Hence, in relation to this particular claim, Nauru has not said that any question of international law is involved in the claim. It does not point to any fact which, if proven, would indicate a breach of international obligation. It does not say that there is any question concerning the interpretation of a treaty. Yet these are essential elements of the definition in Article 36 (2) of a legal dispute over which the Court has jurisdiction.

The diplomatic exchanges in this case contain no material which would turn the alleged dispute into a legal dispute. Thus, the overseas assets claim quite clearly does not fall within the principle of the *Right of Passage over Indian Territory, Preliminary Objections* case. In that case the Court was able to identify a legal dispute from the relevant negotiations and diplomatic exchanges which had disclosed a definite complaint based on action alleged to be inconsistent with international law. There is no such complaint in this case (*I.C.J. Reports 1957*, p. 149).

If Australia's submissions in this regard are accepted and the Court is satisfied that there is no legal dispute in relation to Nauru's overseas assets claim, it follows that the claim does not fall within Article 36 (2) and the Court has no jurisdiction in respect of the claim.

Mr. President, Members of the Court, there is a further reason why Australia submits that the claim to the overseas assets of the BPC cannot fall within Article 36 (2). It is accepted that this Article cannot confer substantive rights. Australia submits that the claim cannot give rise to a legal dispute, within the meaning of this provision, because Nauru has not shown any legal interest in the overseas assets of the BPC.

Indeed, Australia submits that Nauru could not demonstrate any relevant interest in these assets. Nauru does not claim that the assets belong to it. And clearly the assets belong to the BPC. The BPC was an instrumentality of three Partner Governments. The BPC did conduct phosphate operations on Nauru from which it derived revenue. It does not, however, follow from this that Nauru has a legal interest in the assets of the BPC. A State does not acquire a legal interest in a claim relating to the business of a foreign national simply because the foreign national carried on business in that State many years before. Nauru has not, however, asserted any other possible basis for its claim.

Furthermore, the present claim to the assets of the BPC is not consistent with Nauru's conduct in the past. In 1967 Nauru asked to buy those assets of the BPC on Nauru. It paid the Partner Governments an agreed price. It did not make any claim at this time to any other assets of the BPC. Yet it knew at that time the extent of the assets of the BPC. A balance sheet of the assets of the

BPC was attached to each Annual Report of the Administering Authority which was submitted to the United Nations.

The facts which Australia has set out in some detail in its Preliminary Objections show that the purchase by Nauru of the assets of the BPC was an entirely voluntary transaction (paras. 109-112 of the Preliminary Objections). Nauru does not now seek to re-open its purchase of those assets, except to found a claim for compensation. The only reasonable interpretation of Nauru's actions in 1967 is that at that time it did not consider that it had any basis to claim the overseas assets.

Nauru seeks to put off the consideration of its legal interest in this matter until the merits stage. But these questions of jurisdiction are necessarily preliminary. Article 36 (2) of the Statute cannot give jurisdiction if there is no legal dispute, whether because there is no dispute in the relevant sense or because Nauru has shown no legal interest in the claim. All these matters are interconnected. All aspects of Australia's submissions on Article 36 (2) are essentially preliminary. And the Rules make it clear that questions which are preliminary should be determined at this stage of proceedings.

Mr. President, I turn briefly to my final submission on the overseas assets claim. That is, that each of the preliminary objections made by Australia to Nauru's other claims apply equally to the overseas assets claim. The overseas assets claim is either a new claim (as Australia has submitted), or part of Nauru's other claims because directly connected to the question of Trusteeship obligation. If it is not a new claim, then Australia's submissions concerning the termination of obligations under the Trusteeship apply equally to the overseas assets claim. So too do its submissions concerning waiver. That is, Australia submits that Nauru's overseas assets claim, like the claim for rehabilitation, was settled, satisfied, or waived in the comprehensive settlement reached by the Partner Governments with Nauruan representatives in the Canberra Agreement of 1967, or extinguished by the United Nations decision to terminate the Trusteeship.

Further, the reservation contained in Australia's Declaration of Acceptance of 17 March 1975 applies equally to the overseas assets claim.

Australia's submissions concerning the absence of consent of States which are very directly the object of Nauru's claim, stand in a slightly different position. For Australia's contentions in this regard apply whether or not the Nauruan claim to the overseas assets of the BPC is regarded as new, or part of the original Application. Australia's submissions on this issue of absence of consent are to be presented by Professor Pellet, so here I do no more than briefly draw the Court's attention to the salient facts.

The Nauruan claim in relation to the overseas assets is to one pot of gold. Consider the position if Nauru had made claim to the assets of the BPC when it was still a going concern. The claim would, of necessity, have been made against all three Partner Governments for no one of the Partners could have dealt on its own with the assets of the BPC. The reason was that the BPC was created by, and subject to, all three Governments.

Is the position any different now that the BPC has been wound up and the assets distributed? Australia submits that this fact cannot improve the Nauruan claim. It is legally beside the point.

For if Nauru has a claim, it is against the assets of the BPC generally. It is in keeping with this that Nauru has said that it may seek access to the accounts of the BPC. There can be no basis for assigning a special liability to Australia. Indeed, none has been suggested.

The same requests in relation to the overseas assets were made of

New Zealand and the United Kingdom (see, e.g., Ann. 80, Nos. 5, 6, 7, 8, 9, 10, 11, 12). Yet in the Nauruan Memorial those requests and expressions of interest have become an alleged legal dispute with Australia alone.

This points to only one conclusion. The claim to the overseas assets of the BPC can only be regarded as a claim against all three Partner Governments. For the reasons about to be given to the Court, in the absence of the United Kingdom and New Zealand, such a claim cannot be adjudicated upon by this Court.

The Court adjourned from 11.30 to 11.45 a.m.

Mr. President, Members of the Court. Before the break I completed my submissions on Nauru's overseas assets claim. But, as I indicated earlier, there is one other matter for me to address and this is the issue of good faith, in relation to the Nauruan claims as a whole. This issue is covered in Part V of Australia's Preliminary Objections.

We do not rely on the issue of good faith as a separate ground but as a matter relevant to the exercise, as a matter of judicial propriety, of the Court's discretion to decline jurisdiction. In dealing with it, we seek to draw together much of our previous submissions. We submit that when Nauru's claims are considered as a whole, it is clear that they are not credible claims. That is, they are not bona fide claims in any real sense and that, therefore, the Court should exercise its discretion so as to decline jurisdiction in this case. Australia puts its submissions on good faith on this basis.

Take the matter with which I have just dealt, the claim by Nauru to the overseas assets of the BPC. I have already shown that this has never been a real claim. Nauru has never really had a legal interest in the subject-matter and, although Nauru knew the relevant facts for many years, it did not make any claim to the overseas assets of the BPC until it came to lodge its Memorial. The truth is that this claim has never been a bona fide claim at all but has been invented in the course of preparing the Nauruan Memorial.

As to Nauru's other claims, as Professor Bowett and Professor Jiménez de Aréchaga have shown, each of the claims now made by Nauru was settled as between Nauru and Australia by the 1967 Canberra Agreement and each of them was recognized as settled in the termination of the Trusteeship by the United Nations. That is, all these claims have in fact been satisfied. They cannot be given new life by this Application.

That Nauru's claims are not credible claims is confirmed by the fact that Nauru has delayed many years before bringing them to this Court.

What is more, during the period of the Trusteeship, no one alleged that Australia, as part of the Administering Authority, had been guilty of any act of maladministration. Certainly, the Nauruan representative never made any such suggestion.

Indeed, all the contemporary evidence points the other way. Thus in the final report of the Trusteeship Council before independence, the Council noted that:

> "Relations between the Administering Authority and the Representatives of the Nauruan people continue to be cordial; that economic, social and educational conditions continue to be satisfactory and that commendable progress has been made in the Territory." (Para. 310, reproduced in Annex 28 to Australia's Preliminary Objections.)

This tends to confirm the fact that there can be no real claim against Australia for acts done by the Administering Authority during the period of the Trusteeship.

In view of this, it is not surprising that Nauru did not make any allegation of maladministration against Australia at any time in the decades immediately after independence. More than 20 years have now passed since then but only now Nauru accuses Australia of a variety of breaches of International Law, including breaches of the Trusteeship Agreement. These include claims that Australia "abused its rights" over the territory, and "by reason of its improper and arbitrary conduct as Administering Power in Nauru, engaged in acts of maladministration, wrongful under International Law" (para. 47 of the Application).

This is clearly inconsistent with the historical record. That record gives no support whatever to Nauru's claims and it is for this reason that Australia has felt it necessary to point in its Preliminary Objections (paras. 400-407) to what it considers the absence of good faith on the part of Nauru in now bringing its claims to this Court.

Before independence, the issue of rehabilitation had, of course, been the subject of much debate and was well known to all the Parties, as well as to the United Nations General Assembly — that has been covered in earlier submissions. The record makes it clear, however, that Nauru did not at any time allege that Australia, as part of the Administering Authority, was guilty of a breach of the Trusteeship. As other Australian counsel have noted, in November 1967, the Nauruan Head Chief informed the Trusteeship Council that the issue of rehabilitation was not "relevant to the termination of the Trusteeship Agreement", "nor did the Nauruans wish to make it a matter for United Nations discussion" (para. 178 of Australia's Preliminary Objections).

Now, in these circumstances, Australia says that Nauru does not bring its claims in good faith. For 24 years, Nauru represented to the Administering Authority and to the United Nations that it had no quarrel with the Administering Authority and that it was pleased with the way in which the Administering Authority had brought it to independence. It has not shown any different attitude until now and there is some unfairness in bringing these claims against Australia at this late date.

In addition, the conduct of Nauru indicates that even it does not believe in the practicability of rehabilitating the worked-out phosphate lands. Nauru does not deny that if it wishes to rehabilitate the lands worked-out after 1 July 1967, it must bear the cost. This in fact represents about two-thirds of the whole worked-out area. As we have already noted, there is little evidence that Nauru has taken any significant steps towards that end and it is not as though there has been any lack of funds. Nauru has derived considerable income from phosphate mining since 1 July 1967. Certainly, Nauru has given no evidence that rehabilitation is a practicable course. It therefore scarcely seems open to Nauru to accuse Australia of a breach of a legal obligation to take action which may be impracticable, even impossible and, moreover, action which Nauru itself has not been prepared to take.

Mr. President, Members of the Court, Australia submits that if Nauru's claims are taken as a whole, it is clear they are not bona fide claims. They have for the most part been settled or satisfied and in one case the relevant claim never did constitute a real claim at all.

Now Nauru emphasizes in its Written Statement (para. 42) that the principle of good faith does not create obligations. But Australia submits that this is beside the point. What is relevant, and what Australia submits, is that the Court clearly has an inherent jurisdiction to protect the integrity of the judicial processes. Accordingly it has jurisdiction to ensure its processes are not misused.

Mr. President, this idea is familiar in common law jurisdictions. In such jurisdictions, the court is said to have an inherent jurisdiction to protect its processes so as to ensure that they can operate effectively. As part of this jurisdiction a court is said to have power to stop an abuse of its process. In common law jurisdictions it is said to be an abuse of process to bring proceedings if the dispute has been settled or if the action is groundless.

In these jurisdictions another way of putting this is to say that such an action has not been brought in good faith for a proper purpose. The standard texts recognize this. I refer particularly to Halsbury's Laws of England (4th ed., Vol. 36, para. 75, Vol. 37, paras. 14, 434-435, 437, 442-443) and to the English Supreme Court Practice (1991, paras. 18/19/17 and 18/19/18).

In common law jurisdictions, in a case where an abuse of the court's process is shown, the court may, in the exercise of its discretion, decide to prevent the case from going further. This action is not, of course, taken lightly. Nonetheless, it will be taken if the court believes the facts justify it.

Australia submits that the Court should be guided by similar principles in this case. This is in keeping with the Court's statement in the *Northern Cameroons* case: "The Court itself, and not the parties, must be the guardian of the Court's judicial integrity." (*I.C.J. Reports 1963*, p. 29.)

Australia submits that this Court has an inherent power to protect the integrity of the judicial process and that therefore the Court has the power to prevent the continuance of these proceedings. The Court's discretion is a broad one.

In this case there is ample evidence which would enable the Court to exercise its discretion against Nauru, as a matter of judicial propriety. We submit that, having regard to all relevant circumstances, it is clear that Nauru is misusing the Court's processes by pursuing claims which are not credible and not brought bona fide and the Court should exercise its discretion against hearing the claims brought by Nauru against Australia.

Mr. President, we make these submissions without prejudice to the other grounds of objection to the Court's decision on this case.

Mr. President, that concludes my submissions on this point. I invite you to call on Professor Pellet.

PLAIDOIRIE DE M. PELLET

CONSEIL DU GOUVERNEMENT DE L'AUSTRALIE

M. PELLET: Monsieur le Président, Messieurs les juges, un internationaliste ne peut qu'être honoré et, peut-être, un peu ému, chaque fois qu'il se présente devant vous. Je suis à la fois l'un et l'autre — et je vous remercie bien vivement de votre bienveillance. J'ajoute que l'éminence des collègues qui composent les deux équipes de plaidoirie et dont beaucoup, de part et d'autre de cette barre, sont aussi des amis avec lesquels — ou contre lesquels — j'ai eu déjà l'occasion de plaider, ajoute encore à cet honneur et à cette émotion.

Monsieur le Président,

1. Il m'échet de présenter l'exception préliminaire de l'Australie fondée, comme ceci est indiqué dans les écritures australiennes, sur l'absence de consentement de tiers, exception que Nauru croit pouvoir présenter différemment comme portant sur «la jonction ou le consentement de tierces parties ("Joinder or Consent of third Parties»; exposé écrit, p. 85).

Ce n'est pas vraiment la même chose, Monsieur le Président. Mais l'Australie a la prétention de définir comme elle l'entend les exceptions qu'elle soulève et je m'en tiendrai donc à celle qui est vraiment la nôtre: comme l'Australie l'a montré dans ses exceptions préliminaires, la requête de Nauru met inévitablement en cause d'autres Etats, sur la responsabilité desquels la Cour ne pourrait pas éviter de se prononcer si elle devait exercer sa compétence. Ce faisant, elle négligerait en effet le principe, absolument essentiel, qui fonde sa compétence: celui du consentement à la juridiction internationale.

Et c'est ce que je vais maintenant m'efforcer d'établir.

2. Monsieur le Président, si vous m'autorisez cette parenthèse, je le ferai, en évitant d'alourdir mes propos par la mention des références exactes de la jurisprudence ou de la doctrine que je vais citer. Ces références figurent dans le texte écrit de ma plaidoirie que je viens de remettre au Greffe et je serais très reconnaissant à celui-ci de bien vouloir rétablir ces références dans le procès-verbal.

3. Cette parenthèse refermée, je souhaite revenir à titre liminaire sur le fait que Nauru déforme indûment la nature et la portée de l'exception préliminaire soulevée par l'Australie et qu'il m'incombe de défendre.

Dans son exposé écrit, Nauru insiste, avec une certaine emphase, sur le problème des «parties indispensables» («indispensable parties») bien que, pour sa part, l'Australie n'ait pas employé l'expression et que je sois assez enclin à partager la conclusion théorique de Nauru selon laquelle «There is no 'indispensable parties' rule in international law», ce qu'indique son exposé écrit, page 87.

Encore faut-il s'entendre sur le sens exact de cette forte affirmation.

Elle n'est, en réalité, acceptable que du fait de la portée particulièrement large, et même laxiste, que Nauru confère à cette pseudo-règle. Telle que Nauru la conçoit, elle pourrait, je crois, s'énoncer de la manière suivante:

> «La Cour doit s'abstenir de statuer au fond dès lors que les Etats tiers, intéressés par la solution du litige, ne sont pas parties à l'instance.»

Et, sous cette forme bien trop générale, il ne peut y avoir aucun doute: cette prétendue règle n'existe pas.

Oh, bien sûr, Monsieur le Président, Nauru se garde bien d'indiquer formellement ce qu'elle entend par «règle des «parties indispensables», et la formulation que je viens d'en proposer ne figure nulle part dans son exposé écrit. Mais elle peut assez facilement en être déduite. Et, sous cette forme excessive, je le répète, il est vrai que cette « pseudo-règle » ne relève pas du droit positif.

Mais, en l'espèce, ce n'est pas sur cette règle que l'Australie s'appuie, mais sur un autre principe qui n'est, pour sa part, guère susceptible de contestation, celui du consentement à la juridiction internationale. J'y viendrai précisément dans un second temps après avoir montré, dans une première partie, que la Nouvelle-Zélande et le Royaume-Uni partagent entièrement avec l'Australie la prétendue responsabilité des manquements qui sont attribués par Nauru à l'Australie seule.

Ce qui a valu « sur le terrain », concrètement, dans le cadre du régime de la tutelle et plus spécialement en ce qui concerne l'exploitation des phosphates, vaut tout autant devant la Cour, qui ne peut dissocier ce que la Société des Nations puis les Nations Unies ont uni, pas davantage qu'elle ne peut se prononcer sur la responsabilité d'Etats qui ne sont pas présents à la présente instance. On ne peut s'y tromper : l'Australie n'est qu'un bouc émissaire sur lequel Nauru espère attirer les foudres de la justice internationale, faute de pouvoir s'en prendre aux trois Etats qui constituaient conjointement l'autorité de tutelle.

4. J'en viens donc tout de suite, Monsieur le Président, si vous le voulez bien, à mon premier point : les responsabilités de l'Australie, si responsabilités il y a, sont indissociables de celles des deux autres gouvernements participant à la tutelle.

La démonstration de cette proposition fondamentale ne paraît pas constituer une tâche herculéenne tant cette indissociabilité relève de l'évidence dès lors que l'on examine avec tant soit peu d'attention le fonctionnement du mandat et de la tutelle successivement confiés par la SdN et par les Nations Unies aux trois gouvernements.

Le fait est patent si l'on examine le problème sous l'angle politique et administratif, ce que je ferai dans un premier temps. Et les choses sont plus claires encore si l'on centre l'analyse sur le mécanisme d'exploitation des terres à phosphates, question qui est l'objet même de la requête de Nauru et à laquelle je m'attacherai ensuite.

5. Intéressons-nous donc, d'abord, à la tutelle dans son acception la plus large, au « régime international de tutelle pour l'administration et la surveillance » de certains territoires, que régit le chapitre XII de la Charte des Nations Unies.

Je ne nie pas, Monsieur le Président, que ce régime a été précédé d'un autre puisque, après la Grande Guerre, le Conseil de la Société des Nations a confié à « Sa Majesté britannique » « l'administration, sous le régime du mandat », de l'île de Nauru, pour reprendre les termes de l'article premier du mandat du 17 décembre 1920. Mais, pour l'essentiel, au moins quantitativement, les faits que Nauru reproche à l'autorité administrante ont eu lieu pendant la période de tutelle. En outre, et c'est cela surtout qui importe au point de vue juridique, le régime de tutelle sur Nauru se présente expressément comme la continuation du mandat.

Si bien que, sauf à me répéter inutilement, il me paraît raisonnable de présenter, en un exposé unique, les grandes lignes du fonctionnement et du mandat et de la tutelle, en mettant l'accent sur la seconde.

6. Monsieur le Président, les analystes les plus autorisés du régime international de tutelle ont été frappés par un trait particulier de la tutelle exercée sur Nauru et qui ne se retrouve nulle part ailleurs : son caractère collectif qu'ont relevé aussi bien sir Hersch Lauterpacht dans la septième édition du traité d'Oppenheim (*International Law*, Longmans, Londres, vol. I, p. 208), Hans Kelsen (*The Law of the United Nations*, Stevens, Londres, 1951, p. 601 et 609) ou Goodrich et Hambro (*Charter of the United Nations*, Stevens, Londres, 1949,

p. 440) ou Maître Nicolas Veicopoulos (*Traité des territoires dépendants*, Sirey, Paris, t. 1, 1960, p. 144), ou M. Charles Rousseau (*Droit international public*, t. II : *Les sujets de droit*, Sirey, Paris, 1974, p. 404) ou bien d'autres.

Il n'y a pas à chercher bien loin pour constater le caractère collectif qui sous-tend la rédaction des sept brefs articles de l'accord de tutelle pour le territoire de Nauru, que l'Assemblée générale des Nations Unies a approuvés le 1^er^ novembre 1947. L'article 2 de cet accord désigne *« conjointement »* (le mot y est) « les Gouvernements de l'Australie, de la Nouvelle-Zélande et du Royaume-Uni ... comme l'autorité qui exercera l'administration du territoire ». Et les cinq articles suivants confèrent des droits et des obligations exclusivement à l'« autorité chargée de l'administration » composée de cette manière et ceci est vrai, qu'il s'agisse

— de l'administration au sens strict du territoire et de la réalisation des « fins essentielles » de la tutelle concédée, ceci en fonction de l'article 76 de la Charte (art. 3 de l'accord de tutelle) ;
— de la paix, de l'ordre, de la bonne administration et de la défense (art. 4 de l'accord de tutelle) ;
— de la coopération avec le Conseil de tutelle et de la manière de traiter les habitants (art. 5) ;
— du respect des traités et de l'application éventuelle des recommandations des institutions spécialisées (art. 6) ; ou
— des dispositions à prendre pour maintenir la paix et la sécurité internationales (art. 7).

Oui, Monsieur le Président, tout cela relève, en vertu de l'accord de tutelle lui-même, de la compétence de l'autorité chargée de l'administration, c'est-à-dire, *conjointement*, des trois Gouvernements de l'Australie, de la Nouvelle-Zélande et du Royaume-Uni.

7. Il y a lieu à cet égard de s'arrêter un bref instant sur un argument avancé aux pages 100 et 101 de l'exposé écrit de Nauru. Si j'ai bien compris, cet argument consiste à affirmer qu'une « autorité administrante » dans le cadre du régime de tutelle ne constitue pas une personne juridique distincte de l'Etat ou des Etats qui la composent. Faute de quoi, nous dit-on, il serait impossible de rechercher la responsabilité d'une autorité administrante une fois la tutelle ou le mandat dissous et, en particulier, la responsabilité de l'Afrique du Sud en Namibie. *Horresco referens.*

C'est un faux débat, Monsieur le Président.

L'Australie ne prétend pas et n'a jamais prétendu que les mandataires et les autorités de tutelle constituent ou aient constitué un nouveau sujet du droit des gens ; et, bien sûr, elle convient qu'il ne s'agit que d'Etats ayant des droits et des obligations particuliers. Simplement, en la présente espèce, ces droits et ces obligations appartiennent conjointement, comme le précise l'article 2 de l'accord de tutelle, aux trois « gouvernements », terme ici synonyme d'« Etats ».

Il y a là, certes, une particularité très remarquable mais, je le rappelle en passant, il ne s'agit nullement d'une invention *ex nihilo* de l'accord de tutelle ; il s'agit tout simplement d'une application — la seule application d'ailleurs — d'une possibilité expressément envisagée par l'article 81 de la Charte : l'autorité chargée de l'administration « peut être constituée par un *ou plusieurs* Etats ».

Ici donc, plusieurs Etats. Et plusieurs Etats que l'accord de tutelle place sur un pied de parfaite égalité.

8. Cette égalité n'est pas remise en cause par la seconde phrase de l'article 4, dont la partie nauruane fait pourtant grand cas. Il n'est peut-être pas inutile que je relise cet article 4.

Après avoir indiqué que l'« autorité chargée de l'administration [c'est-à-dire les trois gouvernements] répondra de la paix, de l'ordre, de la bonne administration et de la défense du territoire », l'article 4 poursuit :

> « A cette fin, en vertu d'un accord conclu entre les Gouvernements de l'Australie, de la Nouvelle-Zélande et du Royaume-Uni, le Gouvernement de l'Australie continuera à exercer dans ledit territoire pleins pouvoirs législatifs, administratifs et judiciaires, au nom de l'autorité chargée de l'administration, à moins que les trois Gouvernements susmentionnés en décident autrement et jusqu'au moment où une décision en ce sens interviendrait. »

L'Australie donc apparaît ici, en effet, comme le « bras séculier » de l'autorité administrante et il est vrai que, sur le terrain, elle représente l'autorité administrante exactement comme M. James Murray avait fait remarquer que, au temps du mandat, Nauru « had been administered jointly by the United Kingdom, New Zealand and Australia . . ., the latter State acting as day-to-day mandatory » (James N. Murray, *The United Nations Trusteeship System*, the University of Illinois Press, Urbana, 1957, p. 75). Mais sur quels fondements juridiques reposait cette administration au jour le jour ?

Une lecture plus attentive ou plus complète que celle que fait Nauru de l'article 4 que je viens de lire permet de dégager trois éléments essentiels :

1) les fonctions dévolues à l'Australie le sont « en vertu d'un accord » conclu entre les trois gouvernements ;
2) en vertu de cet accord, l'Australie agit « au nom de l'autorité chargée de l'administration » (au nom donc des trois gouvernements « on (their) joint behalf ») ; et
3) cette situation durera jusqu'au moment où les trois gouvernements (et eux seuls) viendraient à en décider autrement.

C'est très clair, Monsieur le Président. L'Australie est appelée à jouer un rôle particulier dans le domaine couvert par l'article 4 (pas dans ceux faisant l'objet des six autres articles de l'accord de tutelle, soit dit en passant), mais dans le cas de l'article 4 elle joue un rôle particulier, mais seulement à titre de *représentant* de l'autorité chargée de l'administration, c'est-à-dire encore et toujours des trois gouvernements.

9. Dans le cadre d'une analyse strictement juridique, l'accord conclu entre les trois gouvernements, dont fait état l'article 4, ne présente d'ailleurs aucun intérêt particulier. Les Nations Unies en prennent note, mais cet accord est pour elles *res inter alios acta* et, par avance, les Nations Unies donnent leur bénédiction aux trois gouvernements dans l'hypothèse où ils décideraient, eux, eux seuls, de le modifier. De leur côté, les Nations Unies ne connaissent que l'autorité chargée de l'administration et, encore une fois, cette autorité chargée de l'administration, ce n'est pas l'Australie.

Arrêtons-nous tout de même un instant à « l'accord conclu entre les Gouvernements de l'Australie, de la Nouvelle-Zélande et du Royaume-Uni » le 2 juillet 1919 et modifié le 30 mai 1923, dont les Nations Unies acceptent, sans l'imposer, la pérennisation dans le cadre de la tutelle.

Comme l'Australie l'a indiqué dans ses exceptions préliminaires (p. 15), cet accord traite de deux catégories de questions : d'abord les questions relatives à l'exploitation des phosphates, problème sur lequel je reviendrai, je pense, demain ; et ensuite, les questions portant sur l'administration de Nauru qui, seule, pour l'instant, nous intéresse. Les deux aspects sont d'ailleurs soigneusement distingués puisque, par l'article 13 de l'accord de 1919 :

> « les trois gouvernements s'engagent à ne pas intervenir dans la direction, la gestion ou le contrôle des opérations d'exploitation, d'expédition ou de vente des phosphates »,

opérations qui sont confiées aux British Phosphate Commissioners, les « BPC », et qui font l'objet de la plus grande partie du traité dont seuls les deux premiers articles concernent l'administration de l'île.

L'article 2 pose le principe de l'autosuffisance financière et ne nous concerne pas, au moins dans l'immédiat. Quant à l'article premier, il confère à un administrateur : « le pouvoir de prendre des ordonnances pour la paix, l'ordre et le bon gouvenement de l'île dans le respect des termes du présent accord » ; et il précise en outre que :

> « Le premier administrateur doit être désigné pour une période de cinq ans par le Gouvernement australien ; par la suite l'administrateur sera désigné de la manière fixée par les trois gouvernements. »

En fait, et bien que ce ne fût pas expressément prévu, des consultations ont toujours eu lieu entre les trois gouvernements préalablement à la nomination des administrateurs. Ce n'est pas moi qui le dis, mais un auteur que Nauru affectionne particulièrement, M. Barrie Macdonald (*In Pursuit of the Sacred Trust*, New Zealand Institute of International Affairs, Occasional Papers n° 3, 1988, p. 21).

10. Le Conseil de la SdN a peu après, le 17 décembre 1920, confié le mandat sur Nauru à « Sa Majesté britannique », en application de la décision prise lors de la conférence de la paix. Les limites, bien françaises, de mon esprit d'analyse m'incitent à ne pas aventurer une interprétation de l'expression « Sa Majesté britannique ». Il y a là du Commonwealth, cette « énigme enveloppée de mystère », comme le disait Churchill, qui défie tout à fait l'analyse cartésienne. Je me bornerai par conséquent prudemment à remarquer que le mandat n'est en tout cas pas confié à l'Australie seule, car si « Sa Majesté britannique » est aussi australienne, ce n'est pas, je crois, faire injure à l'Australie que de dire qu'elle n'est pas seulement australienne. Et si l'on avait entendu remettre à l'Australie le mandat sur Nauru, rien n'eût été plus simple que de le dire, comme d'ailleurs la Société des Nations l'a fait le jour même pour la Nouvelle-Guinée, placée sous mandat australien le 17 décembre 1920 également.

11. Le mandat une fois acquis par « Sa Majesté britannique » donc, et non par l'Australie, une nouvelle négociation s'engagea au sein de l'Empire britannique en vue de préciser les rapports de l'administrateur de Nauru avec le gouvernement qui le nommait, d'une part, et les rapports des trois gouvernements participants entre eux, d'autre part.

Déjà, le 8 septembre 1922, Bruce, premier ministre australien, avait rappelé devant le Parlement que, bien que l'Australie ait nommé le premier administrateur, elle consultait et informait les deux autres gouvernements.

> « It cannot be said, then, [concluait-il] that the administration of the island is exercised by the Australian Government to the exclusion of the other two Governments. » (Exceptions préliminaires, annexe 1.)

Mais l'accord de 1919 était trop général et trop flou et il fallait préciser les choses. Tel a été l'objet de l'accord complémentaire du 30 mai 1923.

Il comporte, comme je l'ai dit, deux parties.

Les paragraphes 1 et 2 explicitent le principe déjà sous-jacent à l'article premier de l'accord de 1919 de la subordination de l'administrateur au « gouvernement contractant qui l'a désigné ». Pour leur part, les paragraphes 3 et 4 concernent surtout les rapports entre les trois gouvernements ; le paragraphe 3 impose au gouvernement qui a nommé l'administrateur de communiquer aux deux autres gouvernements participants les proclamations et directives prises par l'administrateur et le paragraphe 4 concerne les relations du mandataire avec la SdN.

Ce paragraphe 4 constitue une disposition importante :

> « Tout rapport qui doit être soumis au Conseil de la Société des Nations ... doit être adressé par l'administrateur agissant par l'intermédiaire du gouvernement contractant qui l'a désigné au Gouvernement de Sa Majesté à Londres, pour présentation au Conseil *au nom de l'Empire britannique en qualité de mandataire*. »

C'était reconnaître, Monsieur le Président, et de la manière la plus claire que, au plan du droit international, le seul qui importe dans cette enceinte qui lui est consacrée, il n'y avait qu'un seul responsable : « l'Empire britannique, en qualité de mandataire », et non pas le gouvernement qui avait désigné l'administrateur. Nauru ne s'y est pas trompée : dans le très bref passage de son exposé écrit qu'elle consacre à l'accord de 1923 (p. 102), elle analyse les paragraphes 1 à 3 qui, considérés isolément, peuvent être interprétés de manières assez diverses. Mais Nauru se garde bien de souffler mot du paragraphe 4 qui, lui, lève tous les doutes que l'on pouvait avoir : pour des raisons évidentes de commodité, un gouvernement administre Nauru au jour le jour ; mais il le fait au nom des trois gouvernements et, au plan international, c'est l'ensemble que ces trois gouvernements constituent qui seul apparaît en plein jour, qui seul assume la responsabilité de cette administration. Avec les adaptations qu'ont imposées la transformation du mandat en tutelle et les évolutions internes de l'Empire britannique — adaptations réalisées par la pratique mais qu'aucun texte à ma connaissance n'a consacrées —, ce sont ces dispositions de l'accord de 1919 et de celui de 1923 qui sont restées en vigueur jusqu'en 1965. A cette date, un nouvel accord a consacré la plus grande autonomie du peuple nauruan et a abrogé pour l'avenir l'article premier de l'accord de 1919 et l'arrangement de 1923. Elle l'a modifié dans un sens d'ailleurs favorable à l'Australie (qui se voit reconnaître le droit exclusif de nommer l'administrateur, celui-ci perdant au surplus certains de ses pouvoirs théoriques au profit du gouverneur général du Commonwealth d'Australie). Mais peu importent ces modifications : en réalité, outre que le nouveau mécanisme n'est resté en vigueur que 26 mois, il a été, lui aussi, mis en place par un accord entre les trois gouvernements qui, conformément à l'accord de tutelle — ceci est précisé dans l'accord de 1965 —, se sont réservé le droit de le modifier, le cas échéant.

12. Il est bien vrai, Monsieur le Président, que l'administrateur de Nauru a toujours été nommé par le Gouvernement australien, même si c'était en consultation avec les deux autres gouvernements. Et il est bien vrai que cet administrateur a, dès lors, reçu ses instructions du Gouvernement australien. Mais ceci résulte d'arrangements purement internes à l'Empire britannique, arrangements perpétués au sein de l'autorité collective chargée de l'administration après 1947. Et, en vertu des mêmes arrangements, et ce qui est plus important encore, des accords conclus successivement avec la « communauté internationale organisée », la SdN d'abord et les Nations Unies ensuite, en vertu donc de cet ensemble de traités, les trois gouvernements acceptent ensemble, conjointement, collectivement, la responsabilité de cette administration au plan international.

Et cela se vérifie, dans les faits, tout au long de l'existence du mandat et de la tutelle. Il serait très long et il serait très lassant de procéder à une énumération complète de tout ce qui atteste de ceci. Il suffit d'en donner quelques exemples.

Ainsi, un analyste fort peu bienveillant pour l'Australie — toujours Monsieur Macdonald — a relevé que des représentants de la Nouvelle-Zélande et du

Royaume-Uni ont, comme ceux de l'Australie, toujours participé aux débats de la Commission permanente des mandats de la SdN (*In Pursuit of the Sacred Truth*, *op. cit.*, p. 21). Il en fut de même aux Nations Unies, et tout particulièrement à la Quatrième Commission et au Conseil de tutelle. Du reste, la Nouvelle-Zélande a continué de siéger au sein du Conseil de tutelle jusqu'en 1968, au titre de l'article 86, paragraphe 1 *a)*, de la Charte, c'est-à-dire en tant que membre chargé d'administrer un territoire sous tutelle, alors que le seul territoire sous tutelle exclusivement néo-zélandaise, le Samoa occidental, avait accédé à l'indépendance en 1962.

C'est aussi systématiquement à l'autorité administrante que sont adressées les recommandations faites par le Conseil de tutelle et l'Assemblée générale. Et à cela, il n'y a, à ma connaissance, aucune exception. Jamais ces organes ne visent individuellement l'un ou l'autre de ces trois Etats. Et il n'y a pas davantage d'ambiguïté sur ce que les Nations Unies entendent par « autorité administrante » : ce n'est pas l'Australie, ce sont bien les trois gouvernements ; certaines résolutions précisent d'ailleurs que ces trois gouvernements agissent « en qualité d'autorité administrante » (c'est le cas, exemples parmi d'autres, des résolutions 2347 (XXII) de l'Assemblée générale ou 2149 (S-XIII) du Conseil de tutelle).

Destinataires des résolutions des Nations Unies en tant que composants de l'autorité administrante au même titre que l'Australie, la Nouvelle-Zélande et le Royaume-Uni ont eux aussi pris une part active aux discussions qui ont mené aux tranformations successives du régime administratif effectivement appliqué, et ces deux Etats ne se sont nullement laissé dicter leur conduite par l'Australie.

13. Je ne reviens pas sur la période du mandat. Mais il faut rappeler que le projet d'accord de tutelle lui-même a été présenté conjointement par les gouvernements des trois Etats après de très âpres discussions. De même, en ce qui concerne l'accord du 26 novembre 1965, l'annexe 2 reproduite dans le volume III du mémoire de Nauru donne une vue tout à fait inexacte de la manière dont les choses se sont passées. En effet, seul est reproduit le long compte-rendu des négociations qui eurent lieu du 31 mai au 10 juin 1965, entre la délégation représentant le conseil de gouvernement local de Nauru et les représentants officiels australiens de l'autorité administrante — the « Australian Officials representing Administering Authority », comme le précise très nettement le compte-rendu officiel des négociations. Mais la position des trois gouvernements avait auparavant été arrêtée de façon précise au cours d'une réunion qui avait eu lieu en avril (voir exceptions préliminaires, p. 32) et les négociateurs australiens représentant l'autorité administrante restèrent en contact avec les représentants des deux autres gouvernements.

Monsieur le Président, je ne m'arrête pas pour l'instant à la négociation de l'accord de 1967, qui appelle le même genre de remarques mais qui concerne plus précisément, plus directement, l'exploitation des phosphates, problème sur lequel je reviendrai demain. En revanche, il faut dire un mot des conditions dans lesquelles il a été mis fin à la tutelle, et qui sont également tout à fait éloquentes.

Le 31 janvier 1968, Nauru accéda à l'indépendance, mais cette indépendance ne fut pas octroyée par l'Australie ; elle résulte de longs pourparlers entre les représentants du peuple nauruan d'une part, et ceux des trois gouvernements de l'autre. Certes, l'Australie a, d'une manière générale, été leur porte-parole, mais jamais elle n'a agi en son nom propre. Ainsi,

— l'Australie tenait son mandat de négociations de l'autorité administrante, une position commune étant précisément arrêtée au cours de réunions tripartites, préparatoires aux rencontres avec les Nauruans ; tel a été le cas en particulier de réunions tenues du 27 au 30 avril 1966, et du 7 au 9 mars 1967 ;

— si la discussion s'engageait sur un terrain qui excédait les termes de ce mandat de négociations, les négociateurs faisaient savoir aux Nauruans qu'ils leur fallait consulter les trois gouvernements et, à plusieurs reprises, la nécessité d'une concertation entre les gouvernements participant à l'autorité administrante imposa de suspendre les négociations avec les Nauruans ; les écritures des parties donnent maints exemples de ce phénomène (voir notamment les exceptions préliminaires, p. 43-54) ;

— au surplus, la délégation de l'autorité administrante a toujours été composée de représentants des trois gouvernements — sauf dans certains groupes de travail purement techniques qui en référaient aux négociateurs « politiques » ; du reste, la délégation de l'autorité administrante s'est toujours présentée comme une délégation conjointe, jamais comme « délégation australienne » ;

— pour sa part, la délégation nauruane s'est constamment adressée aux « Gouvernements participants », sans d'ailleurs que cela l'empêche de tenter d'ouvrir des brèches dans le « front commun » présenté par les trois gouvernements comme le montre ici encore M. Barrie Macdonald (cf. *In Pursuit of the Sacred Trust, op. cit.*, p. 47-57). Et les Nauruans de s'efforcer de négocier en privé avec chacun des trois gouvernements, notamment la Nouvelle-Zélande, isolément (voir *ibid.*, p. 56) ; ceci montre au moins une chose intéressante, c'est que les représentants de Nauru avaient bien conscience d'avoir à faire non pas à un, mais à trois gouvernements, ceux-ci, en tant que membres de l'autorité administrante, ayant l'obligation d'aboutir à une position commune que Nauru essayait évidemment de rendre plus difficile ;

— du reste, les Gouvernements britannique et néo-zélandais ne se sont nullement dérobés à leur responsabilité et le discours prononcé par le représentant du Royaume-Uni à la Quatrième Commission de l'Assemblée générale, M. Luard, le 6 décembre 1967, à la veille de l'indépendance est tout à fait éclairant ; il reconnaît d'abord le rôle positif joué par l'Australie ; puis il souligne :

> « que les trois autorités administrantes (« the three administering Governments ») ont contribué à cette évolution et ont participé aux négociations qui ont abouti à l'indépendance » (A/C.4/SR. 1739, par. 28 — exceptions préliminaires, vol. II, annexe 30),

revendiquant ainsi une responsabilité propre pour son pays et la Nouvelle-Zélande.

14. Ainsi, Monsieur le Président, le mandat était conjoint ; la tutelle était conjointe. L'un et l'autre ont été confiés, collectivement, aux trois gouvernements participants. Ce sont ces trois gouvernements qui étaient, ensemble, les seuls interlocuteurs des Nauruans aussi bien, d'ailleurs, que des organismes internationaux, chargés de contrôler le respect de leurs obligations de mandataire ou d'autorité administrante, la Société des Nations puis l'Organisation des Nations Unies. Ces trois gouvernements en ont constamment assumé, collectivement, la responsabilité au plan international prenant, ensemble, toutes les décisions concernant le fonctionnement du mandat ou du régime international de tutelle, modifiant ensemble ce mécanisme d'un commun accord, négociant ensemble avec les Nauruans et les organes de contrôle jusques et y compris la fin de la tutelle.

Certes, l'Australie administrait au jour le jour. Mais elle s'acquittait de ces fonctions en vertu d'un mandat que les trois gouvernements lui avaient conféré. Ce faisant, elle n'a jamais agi en son nom propre mais toujours au nom de l'ensemble des trois gouvernements qu'elle représentait. Encore cette « représentation » était-elle, si l'on peut dire, exclusivement « de terrain » et n'avait-elle aucune portée internationale, ou, plus exactement peut-être, cette représentation était purement «endogène», interne à l'autorité administrante. Dans les rapports avec l'extérieur, ce n'est jamais l'Australie qui apparaissait en tant que telle, mais l'autorité administrante, qui «endossait» la responsabilité de tout ce qui avait été fait en son nom.

15. Il est donc, Monsieur le Président, à peine besoin d'avoir recours à la théorie de la représentation en droit international. Toutefois, il faut bien voir que, quand bien même les trois gouvernements n'auraient pas, expressément, endossé cette responsabilité, celle-ci ne leur incomberait pas moins.

Certes, si l'on raisonne dans le cadre de la représentation, la Nouvelle-Zélande et le Royaume-Uni auraient pu, en ce qui les concerne, mettre en cause la responsabilité de l'Australie — le sujet représentant —, ils auraient pu le faire s'ils avaient estimé que l'Australie ne s'était pas acquittée correctement de ses obligations de représentant. Mais ceci n'est plus vrai lorsque la responsabilité est invoquée par des entités extérieures à l'autorité administrante qu'il s'agisse d'autres Etats, du peuple nauruan ou d'organisations internationales.

Selon la définition soigneusement élaborée par M. Riad Daoudi, qui s'est inspiré de celle, classique, de Sereni («La responsabilité en droit international», *RCADI*, 1948, vol. 73, p. 75-76), la:

> «représentation s'analyse juridiquement en droit international en la substitution d'un sujet de droit [ici l'Australie] à un autre sujet de droit [ici l'ensemble formé par les trois Etats] dans l'exercice d'une compétence internationale propre au sujet représenté vis-à-vis de tiers» (ici, les compétences découlant de la tutelle) (R. Daoudi, *La représentation en droit international public*, Pedone, Paris, 1980, p. 72).

Il en découle que les actes accomplis par le représentant (l'Australie) doivent être considérés bien évidemment comme accomplis par le représenté lui-même; ceci avait déjà été très fortement souligé par Anzilotti, au tout début de ce siècle («La responsabilité internationale des Etats à raison des dommages soufferts par des étrangers», *RGDIP*, 1906, p. 11; voir aussi R. Daoudi, *ibid.*, *passim*, notamment p. 73). Il en est de même dans tous les systèmes de droit interne, et l'on peut considérer qu'il y a là un véritable principe général de droit. *Qui fecit per alium fecit per se.*

Il existe quelques applications jurisprudentielles de ce principe — je pense en particulier à l'affaire *Liwschitz* dans laquelle un ressortissant autrichien tenait le Danemark pour responsable de la perte d'une somme d'argent qu'il avait remise au ministère des affaires étrangères de ce pays. Mais le requérant a été débouté par le tribunal danois qu'il avait saisi car le Danemark avait agi, en l'occurrence, pour le compte de l'Autriche-Hongrie (*Annual Digest of International Law Cases*, 1925-1926, n° 165, p. 226). On trouve d'autres illustrations, sinon du principe, du moins de l'idée qui l'inspire, dans la pratique internationale; par exemple, les missions spéciales communes à plusieurs Etats engagent simultanément l'ensemble de ces Etats (voir le commentaire de M. Bartós, rapporteur spécial du projet sur les missions spéciales à la CDI, *ACDI*, 1967, vol. II, p. 55). On peut peut-être aussi considérer que l'idée même d'une responsabilité propre des organisations internationales procède de la même notion, de la même idée générale, même s'il s'agit d'une institution juridique autonome, etc.

Ceci, Monsieur le Président, pour dire une chose simple, mais de très grande portée dans notre affaire: dans toute la mesure où l'Australie aurait représenté l'autorité administrante, c'est celle-ci — c'est-à-dire les trois Etats ensemble et non l'Australie seule — qui, en tout état de cause, serait seule responsable des manquements éventuels au droit international commis par l'Australie.

Mais il est inutile de s'appesantir : en la présente occurrence, les trois gouvernements ont, par leur comportement constant, montré qu'ils se tenaient pour collectivement responsables de la tutelle et, au plan international, ce sont, en effet, eux et eux seuls, qui ont agi ensemble.

L'audience est levée à 12 h 45

TROISIÈME AUDIENCE PUBLIQUE (13 XI 91, 10 h)

Présents : [Voir audience du 11 XI 91.]

M. PELLET : Monsieur le Président, Messieurs les Juges.

J'ai hier consacré la première partie de mon exposé au caractère collectif de la tutelle sur Nauru. J'ai analysé dans ce qu'on pourrait considérer comme la section 1 de cette première partie le mécanisme général de cette tutelle et j'ai montré, je crois, que la Nouvelle-Zélande, le Royaume-Uni et l'Australie y avaient une part égale, même si, dans certains domaines, ce dernier pays — l'Australie — agissait au nom des trois gouvernements participant à l'autorité administrante. Mais, ce faisant, il ne faisait que représenter cette autorité administrante, qui, seule, assume la responsabilité de la tutelle au plan international.

16. Le raisonnement que j'ai suivi hier en matière d'administration générale et de politique générale s'impose avec encore plus de force si l'on quitte le terrain général du régime international de tutelle pour s'intéresser, plus précisément, à ce qu'on peut appeler l'« administration économique » et au mécanisme d'exploitation du phosphate ; et je crois, Monsieur le Président, que cette focalisation est légitime.

En effet, la requête de Nauru ne porte, en réalité, que sur certains aspects de la tutelle, ceux qui sont, justement, liés à l'exploitation du phosphate. Or, le régime juridique de cette activité est, depuis 1919, régi par des règles particulières dont les Missions de visite des Nations Unies successives ont constaté l'effet. Ainsi, par exemple, la première Mission, celle de 1951, a rappelé que :

> « L'Accord du 2 juillet 1919, qui fixe les conditions de l'administration générale de l'île, prévoit également la création d'un conseil connu sous le nom de British Phosphate Commissioners, composé de trois membres respectivement nommés par les Gouvernements du Royaume-Uni, de l'Australie et de la Nouvelle-Zélande, et dont le rôle est d'exploiter et de vendre les phosphates de l'île. » (Mission de visite des Nations Unies dans les Territoires sous tutelle du Pacifique, Rapport sur Nauru, document officiel du Conseil de tutelle, 8ᵉ session, suppl. n° 3, T/898, 1952, par. 13 — reproduit en annexe 7, vol. IV, au mémoire de Nauru.)

Suivait une description des fonctions de ces British Phosphate Commissioners, sur lesquelles je vais revenir dans un petit moment.

En 1956, la troisième Mission des Nations Unies écrivait également :

> « tout en étant le plus petit Territoire sous tutelle, Nauru a encore ceci de particulier qu'elle est administrée conjointement par plusieurs Etats, dont les gouvernements portent un intérêt particulier au Territoire du point de vue économique, comme en témoigne l'existence des British Phosphate Commissioners qu'ils désignent. Comme les Missions précédentes, la Mission a relevé la place prépondérante occupée par les British Phosphate Commissioners, qui contrôlent et exploitent l'industrie des phosphates, principale ressource économique du Territoire ; leurs activités ne sont pas soumises au contrôle direct de l'administration... » (*ibid.*, 18ᵉ session, suppl. n° 41956, T/1256, par. 23, reproduit en annexe 9 au mémoire de Nauru, vol. IV).

17. Cette situation a été créée par l'accord entre les trois gouvernements du 2 juillet 1919, et elle est restée inchangée jusqu'en 1967, c'est-à-dire pendant toute la période visée par la requête de Nauru. Aux termes de l'article 3 de cet accord, chacun des trois gouvernements nomme un membre des British Phosphate Commissioners; mais, ensuite, ce sont les commissaires qui, collectivement, ont la charge exclusive de «la direction, la gestion, ou le contrôle des opérations d'exploitation, d'expédition, ou de vente des phosphates», l'article 13 précisant que «les trois gouvernements s'engagent à ne pas intervenir» dans les activités des BPC.

> «Le résultat, notait la première Mission de visite des Nations Unies, est que toutes les dispositions législatives et administratives concernant l'exploitation des phosphates ne relèvent pas de l'administrateur exerçant ses fonctions d'après les instructions de son Gouvernement, mais des Directeurs représentant les British Phosphate Commissioners ou, pour les questions importantes, des Commissaires eux-mêmes ou des trois Gouvernements qui les nomment...»
>
> «Les British Phosphate Commissioners occupent une place si importante dans l'économie de l'île qu'ils jouissent d'une indépendance administrative presque totale.» (*Op. cit.*, par. 16 et 18.)

Le problème se pose donc en termes différents et plus simples que s'agissant de l'administration générale: pour ce qui est de l'exploitation du phosphate, pas de prédominance, fût-elle de pure apparence, de l'un des trois gouvernements; chacun d'eux agit par l'intermédiaire d'un commissaire qu'il contrôle (il peut le révoquer); mais les trois commissaires sont sur un pied de parfaite égalité.

18. Nauru le sait d'ailleurs, dont toutes les écritures sont en fait une longue mise en accusation de ces BPC.

Je n'en veux pour preuve — et ce n'est qu'un exemple parmi beaucoup d'autres — que le paragraphe 81 de son exposé écrit de juillet dernier:

> «In accordance with its charter, the British Phosphate Commissioners strenuously sought to keep costs down. It organized a relatively cheap labour policy, fought hard against the demands of Australian waterfront unions for white crews (Williams and Macdonald, *The Phosphaters*, pp. 369-372), exercised concern over increasing costs of administration in Nauru . . . and sought to ensure the Trusteeship Council (like its predecessor, the Permanent Mandates Commission) should not have too much information . . .» (P. 30.)

Tout ceci, Monsieur le Président, et bien d'autres choses encore, est imputé par Nauru non pas à l'Australie, mais aux BPC, à ce corps tripartite qui agit collectivement sans procéder à quelque délégation que ce soit.

On retrouve d'ailleurs ces British Phosphate Commissioners, ces trois commissaires, désignés par les trois gouvernements, tout au long de la requête et en particulier de la troisième partie, dans laquelle Nauru définit le «différend».

Et, sans qu'il soit utile de s'attarder ici sur la qualification de ces faits, il est bien vrai que, durant toute la période allant de 1919 à 1967, les BPC ont en effet été seuls responsables de toutes les opérations relatives à l'exploitation et la commercialisation du phosphate.

De même qu'il est vrai que, pour tous les problèmes importants qui ont pu surgir à cet égard, les trois gouvernements ont constamment agi ensemble.

19. Ceci s'est révélé tout particulièrement vrai lors des pourparlers qui ont concerné la remise en état d'une part et la fin de la concession des BPC d'autre part.

C'est à la suite d'une réunion conjointe importante qui s'est tenue à Wellington en septembre 1960 que les trois gouvernements ont décidé de proposer aux Nauruans la solution de la réinstallation. Tous trois ont proposé de prendre en charge, conjointement, les frais que cette opération eût entraînés et suggéré la libre immigration dans les trois Etats comme une solution possible, ceci est indiqué par exemple dans la lettre écrite par M. Hasluck au nom des trois gouvernements à M. DeRoburt, le 12 octobre 1960 (voir exceptions préliminaires, annexe 4). De même, toutes les propositions ultérieures sur cette question et sur celle de la « remise en état » ont été faites au nom des trois gouvernements après de très intenses consultations entre eux. Je n'y reviens pas car le schéma général est le même que celui que j'ai décrit hier en ce qui concerne les discussions relatives à l'indépendance, on peut noter seulement — en tout cas M. Macdonald note (*In Pursuit of the Sacred Trust*, p. 53) — un intérêt plus marqué de l'ensemble des trois gouvernements pour la question.

En tout cas, les négociations furent bien menées par une délégation conjointe qui s'est constamment exprimée au nom commun des trois gouvernements. Il suffit à cet égard de parcourir l'épaisse annexe 4 figurant dans le volume III des annexes au mémoire de Nauru. Cette annexe reproduit le compte rendu des pourparlers de Canberra de 1966 et, si on la parcourt, on s'aperçoit qu'il n'y eut aucune exception à ce que je viens de dire, les trois gouvernements se sont toujours présentés ensemble, et pour sa part, la délégation nauruane s'est constamment et exclusivement adressée aux trois gouvernements ou à l'autorité administrante. Il en a été de même lors des pourparlers de 1967 dont de larges extraits sont également reproduits en annexe 5 du même volume.

Il n'est pas nécessaire d'aller chercher bien loin des exemples de cette conviction qu'avaient les Nauruans d'avoir à faire non pas à l'Australie seule, mais aux trois gouvernements. Le paragraphe 35, par exemple, de la requête de Nauru elle-même cite une déclaration, c'est un exemple parmi d'autres, de la délégation nauruane aux entretiens de 1967, selon laquelle les Nauruans n'étaient pas prêts : « à accepter ... le point de vue des *gouvernements participants* » et j'ai choisi cet exemple à vrai dire pratiquement au hasard, toutes les négociations de 1967 fourmillant de notations de ce genre.

L'accord du 14 novembre 1967 est le résultat de ces négociations. Ses principaux traits me paraissent être les suivants aux fins du débat actuel :

- — d'abord cet accord de 1967 est conclu entre le conseil de gouvernement local de Nauru, d'une part, et les trois gouvernements, d'autre part ;
- — il y est rappelé que les BPC sont propriétaires des immobilisations de l'industrie des phosphates à Nauru pour le compte des gouvernements participants (« on behalf of the partner governments », art. 7) ;
- — il y est prévu que les phosphates extraits de Nauru seront fournis aux gouvernements participants exclusivement, qui garantissent conjointement les débouchés (art. 5) ; et
- — plus généralement les trois gouvernements s'engagent, ensemble toujours, à prendre des mesures permettant aux BPC de s'acquitter des missions provisoires dont cet accord de 1967 les investit (art. 3).

Cet instrument, qui confirme *in fine* la responsabilité conjointe et collective des trois gouvernements en ce qui concerne l'exploitation des phosphates, est, au surplus, intéressant en ce qu'il constitue un accord « à parties multiples » en ce sens que si Nauru y est une partie, les trois gouvernements, eux, font « partie commune » (ce qui explique probablement la rédaction quelque peu embarrassée de certaines des dispositions de cet accord, en particulier de l'article 2, relatif à son application, et de l'article 24, sur la revision, qui parle de « chacune des parties» («either party», au singulier) pour désigner Nauru d'un côté mais, très visiblement, collectivement, les trois gouvernements participants de l'autre, qui, ensemble, forment UNE partie.

20. Je viens de dire que l'accord de 1967 constituait une confirmation *in fine* de la responsabilité commune des trois gouvernements. En réalité, comme M. Burmester l'a rappelé hier, l'Australie a eu la surprise de constater, à la lecture non pas de la requête mais du mémoire de Nauru, que, selon celle-ci, l'accord de 1967 ne constituait pas la dernière étape de cette longue histoire, puisque Nauru prétend maintenant remettre en cause la validité de l'accord conclu le 9 février 1987 entre les trois gouvernements et relatif au sort des biens d'outre-mer des BPC.

Je ne reviendrai pas sur l'ensemble des raisons pour lesquelles l'Australie considère que cette demande nouvelle est irrecevable et que la Cour est incompétente pour en connaître. Seul nous intéresse ici le fait que, en formulant cette nouvelle demande, Nauru met clairement en cause non la responsabilité de l'Australie seule mais celle de l'ensemble des trois gouvernements.

Certes, ceux-ci, dans l'article premier, ont convenu d'une clé de répartition de l'excédent net des avoirs des BPC, une fois réglées leurs dettes. Mais, d'une part, la grille retenue repose sur des considérations multiples, M. Burmester l'a dit hier, qui ne sont qu'en partie liées à l'activité des BPC à Nauru. D'autre part et surtout, il s'agit d'un élément purement fortuit par rapport à notre affaire: les avoirs des BPC, sur lesquels Nauru prétend aujourd'hui avoir des droits, formaient un tout indissociable jusqu'à l'intervention de l'accord de 1987. On imagine mal comment, avant celui-ci, Nauru aurait pu attaquer l'Australie seule et pourquoi la répartition effectuée par cet accord changerait quoi que ce soit à cet égard.

Supposons un instant, ce n'est qu'une supposition, que Nauru obtienne gain de cause sur ce point et que la somme que la Cour lui allouerait de ce chef — je suppose toujours — dépasse le montant de ce qui revient à l'Australie en vertu de l'accord de 1987 — hypothèse plausible puisque Nauru tient l'Australie pour seule responsable de l'injustice qu'elle estime lui être faite et qu'elle affirme, peut-être à juste titre, que l'accord de 1987 ne lui est pas opposable (voir exposé écrit, p. 106).

Mais dans ce cas, Monsieur le Président, il est tout à fait clair que Nauru «aurait droit» (je mets ceci entre guillemets) à toute la part de l'Australie et à quelque chose de plus, c'est-à-dire à tout ou partie de ce qui est revenu au Royaume-Uni et à la Nouvelle-Zélande en vertu de l'accord de 1987. Comment la Cour pourrait-elle se prononcer sur ce point sans trancher, du même coup, la question de la responsabilité de ces deux pays? Nous sommes ici dans l'hypothèse exacte de l'affaire de l'*Or monétaire*: avant de répondre à la demande nauruane, la Cour devrait déterminer le bien-fondé de la répartition effectuée par les trois Etats dans l'accord de 1987, et les intérêts juridiques de la Nouvelle-Zélande et du Royaume-Uni «constitueraient l'objet même» de sa décision, comme ceux de l'Albanie eussent constitué l'objet même d'un arrêt au fond dans l'affaire de 1954 (*C.I.J. Recueil 1954*, p. 32); et ceci, la Cour ne peut pas le faire.

21. Nauru pourrait peut-être rétorquer qu'il suffirait que la Cour détermine les responsabilités propres de l'Australie et fixe une réparation en conséquence. Mais une telle ligne de défense se heurterait à plusieurs objections dirimantes:

i) Nauru tient l'Australie pour responsable de l'ensemble des manquements qu'elle invoque et affirme que l'Australie seule est tenue de réparer dans son intégralité tout le préjudice qui en serait résulté; nous le verrons dans un instant: c'est le sens même de la requête nauruane;

ii) cette séparation des responsabilités — pour l'instant je m'en tiens à la nouvelle conclusion relative à l'accord de 1987 — viderait de toute spécificité cette demande nouvelle liée à la liquidation des avoirs d'outre-mer des BPC car le « titre juridique » que Nauru revendique « sur la part allouée à l'Australie » de ces avoirs (cf. mémoire, p. 250) ne pourrait découler que d'un manquement de l'Australie non pas à l'accord de 1987 lui-même qui ne crée pas d'obligation à l'égard de l'Australie mais au manquement de l'Australie à d'autres obligations, obligations qui, à l'évidence, ne sont pas la conséquence de l'accord de 1987 ;

iii) enfin, et peut-être surtout, on ne voit toujours pas comment la Cour pourrait « individualiser » au regard de l'accord de 1987 une quelconque responsabilité propre de l'Australie.

Et ceci, Monsieur le Président, renvoie au problème général et fondamental qui est posé par cette affaire, indépendamment de celui, plus particulier, découlant de la nouvelle demande nauruane liée à l'accord de 1987. Car, et sans qu'il soit nécessaire, je pense, d'y revenir bien longuement, une individualisation, aussi bien des manquements prétendument commis par l'un ou par l'autre des gouvernements participants que des préjudices, des dommages qui en auraient résulté, est impossible.

Cette impossibilité tient au régime même du mandat et de la tutelle institué par la SdN puis par les Nations Unies. L'Australie n'a jamais, en droit, été l'autorité administrante. Elle ne l'a pas non plus été en fait : dans certaines matières, nous l'avons vu hier, il lui est arrivé d'agir au nom des trois gouvernements participants en vertu d'un mandat que ceux-ci lui avaient donné et qu'ils pouvaient librement modifier, et ce mandat excluait clairement tout ce qui touchait à l'exploitation du phosphate. D'ailleurs, ni la SdN, ni l'Organisation des Nations Unies n'ont jamais considéré l'autorité administrante comme étant « transparente » ; elles n'ont jamais contrôlé l'activité de l'Australie seule ; Nauru, jusqu'à sa requête, n'a jamais invoqué la responsabilité de l'Australie, seule ; les deux autres Gouvernements, néo-zélandais et britannique, n'ont jamais rejeté la responsabilité sur l'Australie, seule. Si responsabilité il y a, celle-ci est commune, conjointe, collective — en tout cas indissociable.

22. Et en fait, Monsieur le Président, Nauru n'a jamais dit le contraire et ce n'est que du bout des lèvres qu'elle le soutient aujourd'hui devant vous.

Elle ne l'a pas dit, nous l'avons vu, lors des pourparlers de 1965 ou de 1967, durant lesquels les représentants nauruans se sont constamment adressés aux « gouvernements participants » ou à l'« autorité administrante ».

Elle ne l'a pas dit au cours des débats du Conseil de tutelle préalables à l'indépendance durant lesquels le chef DeRoburt a fait valoir, avant de renoncer peu après à cette prétention, « qu'il incombe aux trois gouvernements d'assurer la remise en état des terres exploitées avant le 1^er^ juillet 1967 » (13^e^ session extraordinaire, 22 et 23 novembre 1967, T/SR. 1323 et 1324, p. 3 — cité dans la requête de Nauru, par. 37).

Elle ne l'a pas dit non plus dans les deux notes, fort intéressantes, qu'elle a adressées respectivement à la Nouvelle-Zélande et au Royaume-Uni, le 20 mai 1989, et qui constituent les numéros 29 et 30 de l'annexe 80 jointe au mémoire de Nauru. Dans ces notes, elle informe les gouvernements destinataires, c'est-à-dire le Royaume-Uni et la Nouvelle-Zélande, du dépôt de sa requête devant cette Cour mais elle ajoute :

> « This is without prejudice to the Department's position [il s'agit du département des affaires extérieures de Nauru], as recorded in its Note of 20th December 1988, that New Zealand [ou, selon le cas, the United King-

> dom], in its capacity as one of the three States involved in and party to the Mandate and Trusteeship over Nauru, was also responsible for the breaches of those Agreements and of general international law referred to in that Note. »

Il n'est peut-être pas inutile de préciser, Monsieur le Président, que ces « breaches », ces violations, sont très exactement celles que, dans sa requête, Nauru reproche à l'Australie.

Tout ceci est lourd de signification, car ces différentes réclamations montrent au moins deux choses tout à fait fondamentales : d'une part, que Nauru a bien conscience que sa réclamation, sa réclamation unique, concerne, conjointement, les trois gouvernements ; et, d'autre part, que le « tripartisme » de l'autorité administrante oblige Nauru à agir conjointement et simultanément, auprès des trois gouvernements — et c'est en effet ce qu'elle fait aussi longtemps du moins qu'elle ne se tourne pas vers votre Haute Juridiction.

23. Les choses changent, au moins en apparence — j'y reviendrai —, lorsque Nauru saisit la Cour. Alors qu'elle admet, partout ailleurs, et toujours, que le différend, si différend il y a, l'oppose aux trois gouvernements participants, à l'autorité administrante, elle change d'avis et s'en prend, ici et maintenant, à la seule Australie. Un différend unique devient, soudainement, une addition de litiges.

Mais pourquoi, Monsieur le Président, ce qui vaut pour des modes de règlement non juridictionnels ne serait-il pas exact s'agissant du règlement judiciaire qui, après tout, comme l'a dit la Cour permanente, « n'est qu'un succédané au règlement direct et amiable » d'un différend (*Zones franches de la Haute-Savoie et du Pays de Gex, ordonnance, 1929, C.P.J.I. série A n° 22*, p. 13). Pourquoi ce qui est vrai pour les négociations diplomatiques, que Nauru tente d'ouvrir avec les trois Etats, et non pas avec l'Australie seule, ne le serait-il pas en ce qui concerne la saisine de cette Cour ? Pour une raison simple, Monsieur le Président, mais pour une raison qui n'a rien de juridique : Nauru sait bien qu'il ne lui est pas possible d'attraire le Royaume-Uni et la Nouvelle-Zélande devant la Cour. La déclaration facultative d'acceptation de la juridiction obligatoire du Royaume-Uni, en date du 1er janvier 1969 et toujours en vigueur, contient en effet une réserve formelle en ce qui concerne « les différends entre le gouvernement d'un autre pays membre du Commonwealth, qui ont trait à des situations ou à des faits antérieurs au 1er janvier 1969 ». Cette réserve serait évidemment opposable à Nauru s'agissant de sa réclamation actuelle. Du reste, le Royaume-Uni pourrait également invoquer sa réserve relative aux différends que les parties seraient convenues de régler selon un autre mode de règlement pacifique et qui est énoncé dans sa propre déclaration en des termes très voisins de la réserve australienne dont le professeur Jiménez de Aréchaga a parlé lundi. L'autre réserve britannique relative aux Etats dont la propre déclaration vise des différends déterminés pourrait également trouver application en l'espèce.

De son côté, la déclaration néo-zélandaise du 22 septembre 1977 comporte également ces deux dernières réserves.

Au surplus, en formant une requête contre la Nouvelle-Zélande seule, non contre le Royaume-Uni, Nauru aurait dû renoncer à la possibilité, dont elle use abondamment, de tenter d'établir que l'Australie aurait assumé des responsabilités particulières dans les faits qui sont, par ailleurs, reprochés avec constance aux trois gouvernements conjointement investis de l'autorité de tutelle. Ce faisant, Nauru se serait privée de son bouc émissaire ou, si l'on préfère, de son « punching-ball »... Et c'est pour cela qu'elle n'a pas saisi la Cour contre la Nouvelle-Zélande ou contre le Royaume-Uni.

Nous avons vu, Monsieur le Président, ce qu'il en est de ces responsabilités prétendument spéciales de l'Australie. Quoi qu'il en soit, pour ce qui est de mon propos présent, il est tout à fait clair que ces considérations de stratégie judiciaire ne sauraient, en quoi que ce soit, modifier les données fondamentales de l'affaire ; alors qu'elle est formellement dirigée contre l'Australie, la requête porte, en réalité, sur un différend opposant Nauru à l'ancienne autorité administrante, c'est-à-dire aux trois gouvernements, tenus pour conjointement responsables d'un prétendu dommage, unique et indivisible, l'exploitation et la non-remise en état des terres à phosphates avant le 1er juillet 1967. C'est entre ces quatre gouvernements, « trois plus un », que le litige, s'il existe, doit être réglé, par tout moyen pacifique, qu'il soit juridictionnel ou autre.

24. Or, juridictionnel, nous avons vu qu'il ne peut pas l'être sauf, bien sûr, si la Nouvelle-Zélande et le Royaume-Uni acceptaient de soumettre ce différend à votre Haute Juridiction. Mais tel ne semble pas devoir être le cas et ceci est le droit le plus strict de ces Etats puisque, comme la Cour l'a maintes fois répété, sa juridiction « dépend de la volonté des parties » (*Droits des minorités en Haute-Silésie, C.P.J.I. série A n° 15*, p. 22 ; voir aussi *Usine de Chorzów, fond, C.P.J.I. série A n° 17*, p. 37-38 ; *Anglo-Iranian Oil Co., C.I.J. Recueil 1952*, p. 104 ; *Or monétaire pris à Rome en 1943, C.I.J. Recueil 1954*, p. 32 ; *Activités militaires et paramilitaires au Nicaragua et contre celui-ci, fond, C.I.J. Recueil 1986*, p. 32).

Certes, en l'espèce, l'application de ce principe prive Nauru de la possibilité d'un règlement juridictionnel. Mais il n'appartient pas au Gouvernement australien de porter un jugement de valeur sur cette situation qui n'a rien d'exceptionnel en droit international. Dans l'état actuel de la société internationale, c'est au contraire le recours à la juridiction qui constitue un mode exceptionnel de règlement des litiges dont les Etats conservent le libre choix, comme l'implique l'article 2, paragraphe 3, de la Charte des Nations Unies et comme le rappelle l'article 33, paragraphe 1.

D'ailleurs, Monsieur le Président, Nauru n'est pas dupe de sa propre approche.

Oh, bien sûr, les apparences sont sauves. A s'en tenir à une lecture superficielle de la requête de Nauru, celle-ci adresse — dans la section IV — un certain nombre de griefs à l'Australie et — dans la section V — Nauru prie la Cour de déclarer que l'Australie a engagé sa responsabilité internationale et est tenue à réparation. Ces demandes sont confirmées (et, d'ailleurs, augmentées) dans le mémoire. Mais, malgré l'adresse mise par Nauru à dissimuler le véritable objet de sa requête, une lecture attentive le révèle très vite.

S'il faut en croire son titre, la section III de la requête est consacrée au « différend entre la République de Nauru et le Commonwealth d'Australie ». Mais, dès la première phrase de celle-ci, la réalité montre, si j'ose dire, « le bout de l'oreille ».

> « Le différend entre la République de Nauru et le Commonwealth d'Australie trouve son origine dans le fait que, de 1919 au 1er juillet 1967, date de l'entrée en vigueur de l'accord sur l'industrie des phosphates de l'île de Nauru, l'industrie des phosphates a été gérée de manière telle que les profits réels de l'activité minière étaient recueillis par les secteurs agricoles des trois Etats. » (Par. 15.)

Trois Etats que, adresse sans doute, Nauru se garde de nommer puisqu'elle ajoute seulement « surtout l'Australie » mais elle omet la Nouvelle-Zélande et le Royaume-Uni dont les noms, adresse toujours, n'apparaissent qu'une seule fois, à la toute dernière ligne de cette longue troisième partie de la requête.

Ces Etats innommés n'en sont pas moins très constamment présents dans la requête comme dans le mémoire nauruan. Ils sont présents, soit comme autorité administrante, soit, et c'est encore plus fréquent, par l'intermédiaire des BPC, les British Phosphate Commissioners, qui sont leur commune émanation et auxquels Nauru reproche (au paragraphe 16 de sa requête par exemple) de n'avoir pas « accepté l'obligation » d'assurer la remise en état des terres exploitées.

Ainsi, ce que la partie demanderesse appelle le « différend entre la République de Nauru et le Commonwealth d'Australie » est, en réalité, un différend entre Nauru et l'autorité administrante, c'est-à-dire les trois gouvernements participants, l'Australie, la Nouvelle-Zélande et le Royaume-Uni. Et cette constatation découle non pas d'une analyse, qui pourrait être partiale, faite par l'Australie, mais des termes mêmes de la description du différend faite par Nauru elle-même dans sa requête que je me suis borné sur ce point à citer ou à résumer. Il est d'ailleurs tout à fait clair que la même démonstration pourrait être faite sur la base du mémoire nauruan, mais ce serait inutilement fastidieux.

Nauru, Monsieur le Président, n'échappe pas à l'implacable logique de la réalité quand elle énonce ses griefs, quand elle formule ses demandes. Les premiers sont fondés sur de prétendues violations de l'accord de tutelle — c'est-à-dire d'un instrument qui oblige l'Australie seulement en tant que l'un des trois gouvernements participants et sans que ses obligations puissent être distinguées de celles conjointes des deux autres. Quant aux demandes, qui confondent quelque peu la responsabilité au sens strict et la réparation — j'y reviendrai également —, elles consistent à exiger que l'Australie répare le prétendu préjudice — tout le préjudice, le préjudice dans sa totalité, dans son intégralité — résultant des manquements supposés de l'autorité administrante. C'est à cette dernière que Nauru s'en prend réellement et les véritables défendeurs dans cette affaire sont non seulement l'Australie, mais aussi la Nouvelle-Zélande et le Royaume-Uni. Deux d'entre ces défendeurs ne sont pas présents dans cette salle...

26. Monsieur le Président, étant donné le véritable objet de la requête de Nauru, vous ne sauriez vous arrêter aux vêtements trop légers dont l'Etat requérant tente de la parer. Comme votre jurisprudence constante l'a toujours souligné, il vous appartient, au contraire, de rechercher, au-delà de ces trompeuses apparences, en quoi consistent réellement, concrètement, effectivement, les demandes nauruanes.

Certes, il n'appartient pas à la Cour de modifier les demandes de Nauru, mais comme la Cour l'a rappelé dans l'affaire de l'*Interprétation de l'accord du 25 mars 1951 entre l'OMS et l'Egypte* :

> « elle doit rechercher quelles sont véritablement les questions juridiques que soulèvent les demandes formulées dans une requête » (*C.I.J. Recueil 1980*, p. 88 ; voir aussi *C.I.J. Recueil 1956*, p. 26, ou *C.I.J. Recueil 1988*, p. 22).

Sans doute s'agissait-il en l'espèce d'une demande d'avis consultatif, mais le problème ne se pose pas de manière essentiellement différente en matière contentieuse : la Cour y est tout aussi attachée à « rester fidèle aux exigences de son caractère judiciaire » (*C.I.J. Recueil 1980*, p. 88) et ne peut :

> « s'acquitter convenablement de l'obligation qui lui incombe en l'espèce si, dans sa réponse à la requête, elle ne prenait pas en considération tous les aspects juridiques pertinents... » (*ibid.*, p. 89).

Cette jurisprudence n'est d'ailleurs pas confinée aux avis consultatifs. Dans l'affaire des *Essais nucléaires*, la Cour a considéré qu'il était de son « devoir » de circonscrire le véritable problème en cause et de préciser l'objet de la demande car :

> «il n'a jamais été contesté que la Cour est en droit et qu'elle a même le devoir d'interpréter les conclusions des parties; c'est l'un des attributs de sa fonction judiciaire» (*C.I.J. Recueil 1974*, p. 262).

Et, allant plus loin, la Cour a même ajouté qu'il appartient:

> «de s'assurer du but et de l'objet véritable de la demande et elle ne saurait, pour ce faire, s'en tenir au sens ordinaire des termes utilisés; elle doit considérer l'ensemble de la requête, les arguments développés devant la Cour par le demandeur, les échanges diplomatiques qui ont été portés à son attention et les déclarations publiques faites au nom du gouvernement demandeur» (*ibid.*, p. 263).

La Cour a procédé d'ailleurs de la même manière dans son arrêt du 21 mars 1984, l'arrêt par lequel elle a rejeté la requête de l'Italie après avoir rétabli la réalité du but et de l'objet de l'intervention de ce pays dans l'affaire du *Plateau continental (Jamahiriya arabe libyenne/Malte)*; et elle l'a fait conformément aux principes posés dix ans plus tôt (*C.I.J. Recueil 1984*, p. 19-20) dans l'affaire des *Essais nucléaires*.

27. Monsieur le Président, l'application de ces principes en l'espèce ne peut laisser aucun doute sur les fins véritables de la requête nauruane: dès lors qu'on considère cette requête dans son ensemble, que l'on prend en considération les arguments développés par Nauru devant la Cour, les échanges diplomatiques portés à son attention et les déclarations publiques faites au nom du Gouvernement nauruan — autant d'indices de la véritable intention des parties donnés dans l'arrêt de 1974 —, il devient clair que la partie demanderesse poursuit en fait non pas l'Australie mais l'ensemble des trois Etats qui ont constitué l'autorité administrante du temps du mandat et de la tutelle.

Ces considérations me paraissent conduire à une conclusion partielle, qui tient en quatre points essentiels:

i) la requête de Nauru n'est, en réalité, pas dirigée contre l'Australie, mais bien contre l'autorité chargée de l'administration de l'île, et ceci est vrai, aussi bien durant la période du mandat que durant celle de la tutelle; ceci résulte de la rédaction de la requête nauruane elle-même, qu'il appartient à la Cour d'interpréter compte tenu de «tous les aspects juridiques pertinents»;

ii) cette autorité administrante, qui n'a pas de personnalité juridique, n'en était pas moins composée non de l'Australie seule, mais aussi, et conjointement, de la Nouvelle-Zélande et du Royaume-Uni; ces Etats ont toujours assumé pleinement leurs responsabilités au sein de l'autorité administrante, tout particulièrement en ce qui concerne l'exploitation des phosphates qui est au cœur même du présent litige et pour laquelle l'Australie n'assumait aucune espèce d'obligation particulière et n'avait aucun droit qui lui fût propre; si Nauru a des griefs à faire valoir, c'est à ces trois Etats qu'elle doit les adresser; c'est en effet à ces trois Etats que jusqu'à présent elle les a adressés; or

iii) deux d'entre eux ne sont pas formellement visés par la requête de Nauru qui, tout en reconnaissant qu'elle a un différend avec eux, ne formule pas de conclusions à leur encontre et en effet elle ne pouvait pas le faire comme nous l'avons vu;

iv) la Cour, dont la compétence dépend exclusivement de la volonté des Etats, ne peut donc connaître du différend, qui ne lui est soumis que partiellement par Nauru, et dont ni le Royaume-Uni ni la Nouvelle-Zélande n'ont accepté le règlement par la voie juridictionnelle.

Le problème, en effet, n'est pas tant celui du consentement de tiers que celui de l'absence de consentement d'Etats qui, en réalité, sont de véritables parties au litige et ce, encore une fois, de l'aveu même de Nauru, aussi bien dans son mémoire que dans sa requête.

28. Nauru, Monsieur le Président, a d'ailleurs bien vu le problème et, pour tenter d'échapper aux conséquences qui, inéluctablement, découlent du caractère collectif de la responsabilité, d'une part, elle forge une théorie, fort singulière, de la responsabilité — ou, plus exactement sans doute, de la réparation — en droit international, et, d'autre part, elle impute à l'Australie une autre théorie, que celle-ci, j'y ai fait allusion hier, ne défend pourtant pas: une théorie non des « parties indispensables » mais des « parties intéressées ».

En fait, tout ceci tourne autour d'une seule question, mais oh combien fondamentale, celle du consentement à la juridiction internationale. C'est à cette question que je consacrerai, Monsieur le Président, si vous m'y autorisez, la seconde partie de cette plaidoirie qui, je vous rassure, sera plus courte que la première.

Monsieur le Président, Messieurs les Juges, il n'est probablement pas utile de s'attarder sur le premier des points que j'ai cités, la curieuse théorie nauruane de la responsabilité ou de la réparation. C'est inutile d'abord parce que les Parties se sont longuement exprimées à ce propos dans leurs écritures — bien que ce soit bien sûr l'une des raisons aussi de cette relative brièveté. Mais il y a, je crois, des motifs meilleurs encore! Deux surtout: en premier lieu, le problème ne se pose pas véritablement, au moins dans les circonstances de l'affaire; et en second lieu, même si l'on suivait Nauru sur le terrain où elle s'est placée, celui d'une responsabilité solidaire, la raison fondamentale de l'objection australienne demeure — que la responsabilité soit solidaire ou conjointe, le résultat est le même — en examinant la requête au fond, la Cour ne pourrait pas éviter de se prononcer sur la responsabilite de deux Etats qui n'ont pas, en l'espèce, consenti à sa juridiction ni été appelés devant elle, la Nouvelle-Zélande et le Royaume-Uni.

29. Liminairement, il faut cependant essayer de cerner le problème. Durant la procédure écrite, les Parties se sont assez longuement opposées sur le système de responsabilité applicable en l'espèce. Dans son mémoire, Nauru insiste sur le fondement de la responsabilité australienne et affirme qu'il existe en droit international une « présomption de responsabilité séparée ou concurrente » (« several or concurrent responsibility ») qui serait applicable dans notre affaire (p. 236-241). Mais dans ses exceptions préliminaires, l'Australie a interprété ces développements comme signifiant qu'en réalité Nauru se fonde sur le principe de la responsabilité solidaire (« joint and several liability ») (cf. p. 123), qui, dans de telles hypothèses, dit l'Australie, n'existe ni en droit interne ni en droit international (p. 123-130). Et il faut croire que l'Australie a convenablement interprété la pensée des rédacteurs du mémoire de Nauru puisque, dans son exposé écrit, Nauru, loin de s'élever contre l'interprétation australienne, revient à nouveau sur certaines analogies tirées des droits internes pour affirmer par exemple que, dans le cadre de la tutelle, « la responsabilité des co-trustees est conjointe et solidaire et non pas conjointe » (« joint and several, not joint ») (p. 94).

Il y a de quoi s'y perdre. Et j'avoue que, aux premières lectures, ceci m'a paru relever d'une énigme enveloppée d'un mystère presque aussi impénétrable que le Commonwealth vu par Churchill. Cette énigme est aggravée pour un francophone par les difficultés de traduction (responsibility — liability; joint-joint and several, etc.).

Pourtant, à y bien réfléchir, le problème me paraît pouvoir être posé de manière relativement simple. Sans que l'on sache de façon certaine quelle branche de l'alternative choisit Nauru, il y a un choix à faire entre la responsabilité conjointe d'un côté, la responsabilité solidaire de l'autre. Les droits internes connaissent ces notions, mais il est difficile de se fonder sur des analogies trop poussées avec les droits internes. Pas seulement pour la raison — exacte d'ailleurs — qu'avance Nauru et qui tient à la structure différente de la société internationale et des sociétés étatiques (exposé écrit, p. 95), mais aussi et surtout parce que, du fait de cette différence de structure et de la sophistication technique plus grande des droits nationaux, ceux-ci « raffinent » beaucoup plus qu'il n'est raisonnable de le faire en droit des gens. Ainsi, par exemple, il existe en droit français de subtiles distinctions — les Anglo-Saxons n'ont pas le monopole de la subtilité !... — et des relations complexes entre les notions de solidarité passive, d'obligations solidaires, *in solidum* ou indivisibles, d'actes conjonctifs, etc.

Toutefois, à lire les écritures des Parties, il semble que la question peut être posée ainsi : l'Australie peut-elle être condamnée seule à réparer l'ensemble du dommage que Nauru prétend avoir subi ? — et c'est ce que j'appellerai l'hypothèse de la responsabilité solidaire, que Nauru semble défendre. Ou bien — seconde branche de l'alternative — la responsabilité incombant conjointement aux trois Etats, la Cour ne peut-elle se prononcer sur les demandes de Nauru qu'en les condamnant ensemble ? Et c'est ce que l'on peut par commodité nommer l'hypothèse de la responsabilité conjointe.

Il y aurait d'ailleurs une troisième possibilité : que chaque Etat ne soit responsable que de ses propres manquements et ne soit tenu à réparer que les dommages en résultant directement, ce que, toujours par commodité, et peut-être arbitrairement, on pourrait appeler l'hypothèse de la responsabilité séparée. Mais ni l'Australie ni Nauru ne paraissent l'envisager et je crois que c'est à juste titre qu'elles écartent cette hypothèse de responsabilité séparée : l'individualisation est impossible que l'on se place dans la perspective du manquement ou dans celle du dommage — et la distinction est importante entre manquement et dommage, je vais y revenir dans un instant. Pour le manquement, nous l'avons vu, les trois Gouvernements ont agi ensemble ; leur responsabilité, si responsabilité il y a au sens strict et exact du terme, est donc collective. Quant aux dommages invoqués, il est *a fortiori* impossible de les rattacher aux actes de tel gouvernement plutôt que de tel autre. Il s'agit, pour reprendre les propres termes de Nauru, de « the physical destruction of much of (the Nauruan) homeland » (mémoire, p. 245) et, que je sache, il est impossible de dire que l'Australie a exploité telle portion de terre, la Nouvelle-Zélande ou le Royaume-Uni telle autre. Encore une fois, ce n'est d'ailleurs pas ce que demande Nauru.

30. Ceci étant, comme je viens de le dire, il paraît important de distinguer clairement deux niveaux d'analyse : celui du manquement — et c'est la responsabilité *stricto sensu* — et celui des conséquences du manquement — et c'est parmi d'autres le problème de la réparation. Toute la théorie moderne du droit de la responsabilité internationale repose sur cette distinction, conforme à la structure même du projet d'articles de la Commission du droit international sur la responsabilité internationale des Etats.

Comme l'a écrit son rapporteur spécial :

> « il s'agissait, en premier lieu, de déterminer sur la base de quelles données et dans quelles circonstances on peut établir à la charge d'un Etat, l'existence d'un fait illicite international, source en tant que tel, d'une responsabilité internationale. En deuxième lieu, il fallait déterminer les conséquences que le droit international attache à un fait illicite international. » (R. Ago, 3e rapport sur la responsabilité des Etats, *ACDI*, 1971, vol. II, 1re partie, par. 7.)

Au principe de base de la première partie du projet d'articles de la Commission du droit international, qui résulte de la combinaison des articles 1 et 3, selon lequel tout fait internationalement illicite engage la responsabilité de l'Etat auquel il peut être attribué, correspond, en matière de réparation, le principe selon lequel l'Etat est tenu de réparer les effets dommageables de ce fait illicite dès lors que le dommage est la conséquence directe du manquement.

Je n'ai pas l'intention, Monsieur le Président, de continuer dans ce registre. Mais ce bref rappel était nécessaire pour bien établir que la réparation est une *conséquence* de la responsabilité. Qu'avant que l'on puisse parler de réparation, il faut, d'une part, qu'un fait internationalement illicite ait été commis par un Etat ou lui soit attribuable et, d'autre part, que ce fait soit la cause du préjudice. En d'autres termes encore, la réparation est «en aval» de la responsabilité. Elle vient après. Elle se situe au bout de la chaîne de responsabilité.

Or, la question de la solidarité ou de la conjonction débattue entre les Parties concerne non la responsabilité elle-même, mais bien ses conséquences, les modalités de la réparation. Cette question ne pourrait dès lors se poser que si un manquement pouvait être attribué à l'Australie seule, puisque seule l'Australie est l'objet de la présente procédure; or nous l'avons vu, tel n'est pas le cas: les responsabilités sont collectives, parce que les manquements, si manquements il y a, sont collectifs. Le choix entre l'hypothèse de la responsabilité conjointe ou l'hypothèse de la responsabilité solidaire n'a d'importance que pour déterminer selon quelles modalités la réparation est due. Et, à proprement dire, ce n'est d'ailleurs pas de responsabilité que l'on devrait parler ici, mais de «réparation» conjointe ou solidaire.

Autrement dit, ce n'est que si la Cour devait écarter la thèse australienne quant au caractère indissociable des responsabilités des trois gouvernements participants, caractère qui tient, je le répète, au principe même de leur tutelle conjointe, que la Cour devrait aborder le problème de la réparation conjointe ou solidaire. Et, pour toutes les raisons que j'ai développées dans la partie précédente de mon exposé, je ne crois pas qu'il y ait lieu pour la Cour de s'y arrêter: les manquements éventuels doivent inévitablement être attribués conjointement aux trois Etats. On voit mal comment l'un d'entre eux seulement pourrait être tenu de réparer le préjudice qui pourrait découler de leur action conjointe.

31. Ce n'est donc, Monsieur le Président, que pour surplus de droit et par précaution que je dirai tout de même un mot de ce dilemme entre la conjonction et la solidarité. La thèse que je vais esquisser, Monsieur le Président, est simple: il y a toutes les raisons de penser que la responsabilité des Etats participant à la tutelle sur Nauru n'est pas solidaire, mais conjointe. Toutefois, en réalité, la réponse à cette question n'a pas beaucoup d'importance: qu'elle soit l'une ou l'autre, qu'elle soit conjointe ou qu'elle soit solidaire, le résultat est le même, la Cour ne pourrait se prononcer car, si elle le faisait, elle devrait nécessairement se prononcer, du même coup, sur la licéité d'actes d'Etats qui ne sont pas présents à l'instance.

32. Premier point d'abord — la responsabilité est-elle solidaire ou conjointe ? Il me semble que l'Australie s'est suffisamment expliquée dans ses exceptions préliminaires, sans être réellement démentie par Nauru, et qu'il n'y a donc pas lieu d'y revenir longuement. Et je ne peux guère mieux faire que d'essayer de résumer rapidement les principaux arguments australiens.

Les premiers tiennent à des analogies tirées des droits internes des Etats. Comme le dit l'article 1201 du Code civil français, «la solidarité ne se présume pas» et ceci paraît bien constituer un principe très général de droit que l'on retrouve dans les principaux systèmes juridiques du monde, qu'il s'agisse des droits latins, de la *common law* ou du droit islamique par exemple. Au surplus, lorsqu'il y a solidarité, ceci a, dans la quasi-totalité des cas, comme conséquence que celui qui a été condamné à payer l'intégralité de la somme due peut, à son tour, poursuivre les autres codébiteurs ou coresponsables devant les tribunaux. Comme l'a relevé lord Templeman dans l'arrêt rendu par la Chambre des Lords britannique dans l'affaire du Conseil international de l'étain, cette possibilité de se retourner contre les autres coresponsables relève d'une existence logique de justice naturelle (*Maclaine Watson* v. *Department of Trade* (1989), *ILM*, 1990, p. 671).

Or, pour des raisons qui tiennent à la structure même de la société internationale, à laquelle Nauru demande, fort légitimement, que l'on attache une grande importance (exposé écrit, p. 95), cette possibilité, pour un Etat responsable qui serait condamné par la Cour, de se retourner contre des Etats coresponsables, n'existe pas. Il y a du reste sur ce point une contradiction interne, qui paraît assez flagrante, dans le raisonnement de Nauru : Nauru insiste, à juste titre, sur le fait que la Cour n'a aucune possibilité d'obliger un Etat à se présenter devant elle ; mais, curieusement, elle semble en tirer la conséquence que, dès lors, la responsabilité est solidaire (*ibid.*). C'est le contraire qui est vrai, Monsieur le Président, précisément parce que la Cour ne peut enjoindre à un Etat de comparaître, elle ne peut se prononcer que si tous ceux qui ont concouru à un dommage sont présents à l'instance.

Dans le même esprit, Nauru avance également trois autres propositions qui, dans leur principe, reviennent au même :

i) l'Australie ne peut se prévaloir, dans la présente instance, d'un droit de recours qu'elle pourrait avoir contre la Nouvelle-Zélande ou le Royaume-Uni (exposé écrit, p. 106-107) ;
ii) même si l'Australie a un droit de recours contre d'autres Etats, la demande nauruane est recevable (*ibid.*, p. 105-106) ; et
iii) il ne résulterait pas d'une décision au fond défavorable à l'Australie que celle-ci aurait un droit de recours contre d'autres Etats (*ibid.*, p. 105).

En clair, ceci semble signifier que Nauru se désintéresse de la question de savoir si l'Australie peut, ou ne peut pas, se retourner contre la Nouvelle-Zélande et le Royaume-Uni. Monsieur le Président, je ne suis pas sûr que Nauru ait raison de s'en désintéresser car c'est un problème important. De deux choses l'une, en effet. Ou bien l'Australie a un tel droit de recours et elle ne pourrait exercer ce droit que s'il résultait de l'arrêt que vous rendriez au fond que ces deux Etats sont responsables. Ou bien l'Australie ne bénéficie d'aucune possibilité de recours et, dans cette hypothèse, la Cour ne peut pas condamner l'Australie solidairement car, dans le cas contraire, l'Australie supporterait seule les conséquences de faits prétendument illicites qu'elle n'a pas commis seule — ce que, d'ailleurs, les trois propositions nauruanes que je viens de mentionner admettent implicitement. Cette conséquence n'est pas admissible et ne serait guère compatible avec l'exigence de justice naturelle à laquelle je faisais allusion il y a un instant.

D'ailleurs, la possibilité pour un coresponsable solidaire de se retourner contre les autres coresponsables est, dans les systèmes juridiques nationaux, un corollaire inhérent à l'idée même de solidarité. Et ce n'est que justice.

A côté de ces objections tirées des analogies avec les droits internes — et de leurs limites —, l'Australie en a également fait valoir d'autres qui sont propres au droit international (exceptions préliminaires, p. 124-128). Elle a notamment établi le caractère exceptionnel qu'y revêtent, en droit international, les régimes organisés de solidarité et la répugnance de la Commission du droit international pour en admettre le principe, même, et c'est intéressant, en ce qui concerne les conséquences préjudiciables d'activités qui ne sont pas interdites dans le droit international où la solidarité serait peut-être plus logique. L'Australie a également insisté sur l'absence totale de jurisprudence internationale, qui irait dans le sens de la solidarité.

33. Nauru n'a pas, à vrai dire, répondu à cette argumentation et je vois mal ce que je pourrais ajouter ici, sinon que tout ceci paraît établir très fermement que le problème de responsabilité se pose dans notre affaire en termes de conjonction et non de solidarité. C'est-à-dire que si les trois Etats sont responsables des manquements que leur impute Nauru, ils doivent, tous les trois, en assurer ensemble la réparation et que l'Australie ne peut être condamnée, seule, à en répondre.

Il va de soi que, si la responsabilité est conjointe, l'absence à l'instance de ces deux Etats constitue un obstacle dirimant à la recevabilité de la requête : par définition même, la Cour ne pourrait faire droit aux demandes de Nauru sans se prononcer sur leur responsabilité, ce qui est incompatible avec le principe fondamental du consentement à la juridiction internationale.

Mais, à y bien réfléchir, le problème ne se pose pas dans des termes différents si la responsabilité est solidaire. Sans doute, dans cette hypothèse, seule l'Australie serait condamnée à réparer l'ensemble du dommage. Mais la Cour ne pourrait arriver à ce résultat que si elle avait préalablement déterminé que l'Australie est responsable de faits internationalement illicites, ce qu'elle ne peut faire indépendamment de la responsabilité de l'autorité administrante — c'est-à-dire des trois gouvernements participants — puisque, comme je l'ai montré, l'Australie n'avait pas, en la matière, d'obligations internationales qui lui fussent propres.

Au mieux pour la thèse nauruane, la Cour pourrait-elle estimer que l'Australie ne s'est pas acquittée convenablement des fonctions que lui avaient confiées les trois gouvernements ; mais, si la Cour faisait ceci, elle se prononcerait sur la responsabilité de l'Australie, non pas vis-à-vis de Nauru, mais à l'égard des deux autres gouvernements participants ; et, faute de prendre position sur la responsabilité passive de la Nouvelle-Zélande et du Royaume-Uni, la Cour déterminerait leurs droits à l'égard de l'Australie — ce qu'aucun des trois Etats intéressés ne lui a demandé ; ce faisant, la Cour porterait également atteinte au principe consensuel. En outre, elle ferait ceci sur la base des accords de 1919, 1923, 1965, voire même 1987, autant d'instruments auxquels Nauru n'est pas partie et qui, en tout état de cause, je le rappelle, ne confèrent aucune responsabilité particulière à l'Australie, en tout cas dans le domaine qui fait l'objet de la requête : l'exploitation des phosphates.

Ainsi, Monsieur le Président, de quelque manière que l'on prenne le problème, que la responsabilité soit conjointe ou qu'elle soit solidaire — ce qu'elle n'est probablement pas ; que, dans ce cas, la Cour s'interroge sur les prétendues violations de l'accord de tutelle ou sur celles des arrangements internes à l'autorité administrante, le résultat sera toujours le même : les intérêts juridiques de la Nouvelle-Zélande et du Royaume-Uni ne pourraient être que l'objet même de la décision que la Cour en viendrait à rendre sur le fond.

L'audience, suspendue à 11 h 25, est reprise à 11 h 40

Monsieur le Président, avant cette pause, j'avais indiqué que, que la responsabilité soit conjointe ou solidaire, les intérêts juridiques de la Nouvelle-Zélande et du Royaume-Uni seraient, dans tous les cas, l'objet même de la décision que la Cour rendrait le cas échéant sur le fond.

34. Si c'est en cela que consiste la règle des « parties indispensables », dans le fait que la Cour ne peut se prononcer sur la responsabilité d'Etats qui ne sont pas formellement parties à un différend qui lui est soumis, alors, Monsieur le

Président, l'Australie soutient en effet que la règle, qui se confond avec celle du consentement à la juridiction internationale, existe bel et bien. Mais Nauru impute, sur ce point, à l'Australie une conception bien plus large, qui n'est pas la sienne et qui, d'ailleurs, est parfaitement inutile pour établir, en l'espèce, l'incompétence de la Cour.

Tout le passage de l'exposé nauruan qui est consacré à ce débat assez vain sur les «parties indispensables» («indispensable parties») consiste en une longue série de citations extraites d'arrêts de la Cour, série qui est d'ailleurs aussi significative par les passages qui y figurent que par ceux qui en sont omis.

Je n'ai pas l'intention de passer ces extraits en revue car il n'en résulte qu'une chose — avec laquelle l'Australie est d'accord : il ne suffit pas qu'un Etat soit intéressé, simplement intéressé, par le règlement d'une affaire pendante devant la Cour entre deux autres Etats pour que celle-ci doive décliner l'exercice de sa compétence.

Nauru accorde toutefois une importance particulière à l'arrêt rendu en 1984 sur les exceptions préliminaires que les Etats-Unis avaient opposées à la requête du Nicaragua. Et ceci me conduit à en dire un mot alors que le précédent ne paraît, en réalité, guère pertinent.

Certes, le Costa Rica, le Honduras et El Salvador auraient pu subir, concrètement, certaines conséquences de l'exécution effective par les Etats-Unis d'un arrêt faisant droit aux prétentions du Nicaragua dans l'affaire des *Activités militaires et paramilitaires au Nicaragua et contre celui-ci*. Mais, comme la Cour l'a souligné, les droits et responsabilités de ces trois Etats centraméricains n'étaient pas l'objet direct de la décision qu'elle était appelée à rendre (*C.I.J. Recueil 1984*, p. 430-431). La raison du rejet des prétentions des Etats-Unis à cet égard est fort bien explicitée dans l'opinion individuelle de M. Ruda : il y avait là plusieurs différends distincts, celui entre les Etats-Unis et le Nicaragua d'une part, ceux entre le Nicaragua et chacun des trois autres Etats d'Amérique centrale d'autre part, le Nicaragua étant d'ailleurs requérant dans le premier cas, «sur la défensive» dans les trois autres (*ibid.*, p. 457-458). Et l'on peut faire la même analyse de l'arrêt de 1988 rendu dans l'affaire des *Actions armées frontalières et transfrontalières (Nicaragua c. Honduras)* (voir *C.I.J. Recueil 1988*, p. 92) ou de celui rendu par la Chambre de la Cour appelée à trancher le *Différend frontalier (Burkina Faso/République du Mali)* et qui n'impliquait en aucune manière que la Chambre se prononce sur les droits et obligations d'un Etat tiers, qui en l'occurrence aurait été le Niger (*C.I.J. Recueil 1986*, p. 579). Plus généralement d'ailleurs, une frontière, qu'elle soit terrestre ou maritime, est avant tout une ligne. Une ligne peut, par hypothèse — par hypothèse mathématique —, être fractionnée, segmentée, alors qu'il en va différemment pour un condominium, une cosouveraineté, une cotutelle ou une coresponsabilité. Si bien que la jurisprudence de la Cour en matière frontalière risque à vrai dire d'être, de toute manière, très peu éclairante dans l'affaire qui nous préoccupe.

Certes encore, dans les arrêts que cite Nauru par lesquels la Cour se prononce sur certaines requêtes à fin d'intervention, votre Haute Juridiction a fait soigneusement la différence entre l'intérêt qu'elle peut reconnaître ou non à l'Etat requérant d'intervenir et les circonstances de l'affaire de l'*Or monétaire pris à Rome en 1943*. Dans cette affaire, la Cour avait été conduite à se déclarer incompétente car, pour décider au fond, il lui aurait fallu se prononcer sur les intérêts juridiques d'un Etat tiers, en l'occurrence l'Albanie (*C.I.J. Recueil 1954*, p. 32). Cette distinction apparaît avec une netteté particulière dans l'arrêt rendu le 13 septembre 1990 par la Chambre de la Cour constituée en l'affaire du *Différend frontalier terrestre, insulaire et maritime* sur la requête du Nicaragua à fin d'intervention.

Ici encore, la Chambre fait une distinction entre un Etat ayant un intérêt d'ordre juridique susceptible d'être affecté par la décision à intervenir et une partie au litige et, après avoir constaté que le Nicaragua se trouvait dans la première de ces situations, la Cour autorise le Nicaragua à intervenir dans une mesure limitée tout en s'estimant compétente pour se prononcer sur le fond de l'affaire que lui ont soumise le Honduras et El Salvador. Un aspect de cet arrêt de la Chambre mérite toutefois que l'on s'y arrête un instant.

Dans l'arrêt de 1990, la Chambre reconnaît le droit du Nicaragua à intervenir sur la question limitée du régime juridique des eaux du golfe de Fonseca. La Chambre ne considère pas pour autant que les intérêts de l'Etat intervenant constituent l'objet même du différend. Mais pourquoi la Chambre a-t-elle adopté cette position ? Pour une raison très précise, qui lui donne tout son sens : comme la Chambre le relève :

> « En ce qui concerne le condominium [sur le golfe de Fonseca], le fond du litige entre les Parties [le Honduras et El Salvador] n'est pas la validité intrinsèque de l'arrêt de 1917 de la Cour de Justice centraméricaine dans les relations entre les parties à l'affaire portée devant elle [il s'agit cette fois d'El Salvador et du Nicaragua], mais l'opposabilité au Honduras, qui n'y était pas partie, de cet arrêt lui-même ou du régime qui y est déclaré applicable. » (*C.I.J. Recueil 1990*, p. 122.)

Il convient d'interpréter ceci *a contrario* et il est clair que, s'il s'était agi de refaire le procès de 1917, c'est-à-dire de déterminer l'existence d'un condominium auquel le Nicaragua serait partie prenante, la Chambre aurait considéré que les intérêts de ce dernier pays constituaient l'objet même du litige porté devant elle.

Ceci d'ailleurs paraît assez évident : s'il existe un problème de condominium entre trois Etats, on voit assez mal comment l'existence ou la consistance d'un tel condominium pourrait être l'objet d'un différend entre deux de ces Etats seulement sans que les droits du troisième fassent, également, l'objet de la décision.

35. C'est, très exactement, ainsi que se pose le problème en la présente espèce : Nauru demande à la Cour de déterminer la responsabilité de l'Australie en tant que « gouvernement participant » à l'autorité administrante ; celle-ci a été formée de trois Etats et il paraît dès lors impossible de se prononcer sur les droits et obligations de l'un sans le faire, du même coup, sur ceux des deux autres ; il existe entre eux, nécessairement, une communauté d'intérêts et de droits indissociables.

Sans doute, Nauru a-t-elle raison de penser que ce n'est pas là, exactement, le cas de figure qui avait conduit la Cour à se déclarer incompétente dans l'affaire de l'*Or monétaire*. Dans cette affaire, la détermination des intérêts juridiques de l'Albanie constituait le préalable nécessaire au prononcé de l'arrêt : l'or disputé entre les Parties ne pouvait être remis à l'Italie ou au Royaume-Uni que si l'Albanie était tenue à réparation (*C.I.J. Recueil 1954*, p. 31-32). En la présente espèce, la détermination des responsabilités éventuelles de la Nouvelle-Zélande et du Royaume-Uni n'est pas préalable à l'appréciation de la responsabilité de l'Australie ; elle est, inévitablement, nécessairement, *simultanée*.

C'est une différence, certes. Mais cette différence ne change pas grand-chose à l'affaire et les raisons profondes qui, en 1954, avaient conduit la Cour à refuser de se prononcer au fond sur la requête de l'Italie se retrouvent à l'évidence dans la présente espèce :

> « statuer sur la responsabilité internationale de l'Albanie sans son consentement serait agir à l'encontre d'un principe de droit international bien établi

> et incorporé dans le Statut, à savoir que la Cour ne peut exercer sa juridiction à l'égard d'un Etat si ce n'est avec le consentement de ce dernier» (*C.I.J. Recueil 1954*, p. 32).

Or ici ni la Nouvelle-Zélande, ni le Royaume-Uni, ni même Nauru, de manière expresse en tout cas s'agissant justement de ces deux pays, n'ont donné leur consentement à la saisine de la Cour alors même que celle-ci ne pourrait se prononcer sur la prétendue responsabilité de l'Australie sans le faire, du même coup, sur celle des autres Etats participant à l'autorité de tutelle.

Et d'ailleurs, à y bien réfléchir, cette différence entre les circonstances qui ont donné lieu à l'arrêt de 1954 et celles de la présente affaire est encore plus limitée qu'il y paraît ; comme je viens de le dire, la Cour ne pourrait se prononcer sur la responsabilité éventuelle de l'Australie sans le faire, du même coup, simultanément, sur celle, tout aussi éventuelle, des deux autres «gouvernements participants». Mais les conclusions de Nauru ne se bornent pas à tenter d'obtenir une déclaration de responsabilité ; Nauru prétend également à une réparation. Or, celle-ci n'est que la conséquence — l'une des conséquences possibles — de la responsabilité. En clair, cela signifie que la Cour ne pourrait se prononcer sur la demande nauruane en réparation qu'après avoir constaté la responsabilité de l'autorité administrante, c'est-à-dire des trois Etats. On est donc ramené sur ce point, en ce qui concerne la réparation, à la jurisprudence de l'*Or monétaire* : la détermination de la responsabilité des trois Etats est le *préalable* indispensable à la fixation d'une quelconque réparation. Or, pour paraphraser la Cour,

> «statuer sur la responsabilité internationale de la Nouvelle-Zélande et du Royaume-Uni sans leur consentement serait agir à l'encontre d'un principe de droit international bien établi et incorporé dans le Statut»,

celui du consentement à la juridiction de la Cour. Et ceci est vrai que l'on se place sur le terrain de la responsabilité *stricto sensu* ou sur le terrain de la réparation.

36. Dans l'opinion dissidente qu'il a jointe à l'arrêt du 21 mars 1984 rejetant la requête de l'Italie à fin d'intervention dans l'affaire du *Plateau continental (Jamahiriya arabe libyenne/Malte)*, sir Robert Jennings a fait remarquer qu'accepter l'intervention d'un Etat qui essaierait d'intenter sa propre action à l'encontre d'une partie avec laquelle l'intervenant n'aurait pas de lien juridictionnel reviendrait à

> «violer le principe fondamental de la compétence consensuelle et d'une manière qui ferait du recours à la Cour une entreprise hérissée d'embûches» (*C.I.J. Recueil 1984*, p. 150).

Nous sommes ici dans l'hypothèse «symétrique» si l'on peut dire : Nauru, qui pense ne pas pouvoir attraire les deux autres Etats concernés devant la Cour, n'en tente pas moins d'obtenir, indirectement, un prononcé judiciaire sur la responsabilité éventuelle de ces Etats. La Cour, Monsieur le Président, ne saurait s'engager dans ce chemin semé d'embûches.

M. Jennings, dont, incidemment, je remarque qu'il se place bien sur le terrain du principe posé dans l'affaire de l'*Or monétaire*, et ceci contrairement à ce qu'affirme Nauru à la page 89 de son exposé écrit, ajoute :

> «L'affaire de l'*Or monétaire* montre d'ailleurs que, si les droits d'un Etat tiers sont directement mis en jeu par les questions mêmes qui ont été portées devant la Cour par les Parties, ce n'est pas quand l'Etat tiers intervient que se pose le problème de la compétence : c'est quand il n'intervient pas.» (*Ibid.*, p. 155.)

Or, quelles que soient leurs raisons — mais c'est en tout cas leur droit —, la Nouvelle-Zélande et le Royaume-Uni n'interviennent pas.

37. On peut d'ailleurs se demander s'il suffirait qu'ils interviennent — et à quel stade ils devraient le faire — pour que leurs intérêts juridiques soient protégés. Mais, dans l'état actuel des choses, la question est oiseuse et je ne m'y arrête pas.

Le fait est : ces deux Etats ne sont pas ici ; or, pour se prononcer sur la requête de Nauru, la Cour devrait nécessairement prendre position sur le respect des obligations de tutelle par l'autorité administrante. C'est d'ailleurs ce que l'Etat requérant lui-même lui demande puisque ses griefs consistent à peu près exclusivement à invoquer des manquements au régime de tutelle. Si celui-ci n'a pas été respecté, il ne l'a pas été par l'autorité qui en était chargée, c'est-à-dire par l'ensemble des trois gouvernements ; et l'on voit mal, dans ces conditions, comment l'on pourrait raisonnablement prétendre que les intérêts juridiques de la Nouvelle-Zélande et du Royaume-Uni, en tout cas leur droit fondamental de ne pas être jugés sans leur consentement, seraient préservés, fût-ce par l'article 59 du Statut de la Cour ou de toute autre manière.

Monsieur le Président, je ne sais pas s'il existe, en droit international, une règle des « parties indispensables ». Je sais en revanche qu'il en existe une, et « bien établie », et « incorporée dans le Statut », selon laquelle un Etat ne peut être jugé sans son consentement. Qu'elle le veuille ou non, c'est ce que Nauru demande. Et à vrai dire elle le veut ; mais sachant que ceci est impossible, qu'elle ne peut attraire deux Etats dont les intérêts juridiques sont directement en cause devant cette Cour, Nauru s'efforce de tourner la difficulté en dirigeant formellement sa requête contre l'Australie seule, mais sans pouvoir dissimuler que le différend, en réalité, l'oppose aussi aux deux autres Etats qui ont composé l'autorité administrante.

38. Monsieur le Président, comme l'a rappelé l'agent lundi matin, l'Australie a manifesté sa pleine confiance dans la Cour — mais dans les limites que le Statut de la Cour et les principes fondamentaux du droit international tracent à sa compétence. En la présente occurrence, ce n'est pas à l'Australie seule — et à Nauru bien sûr — que la Cour doit faire justice. C'est aussi à d'autres Etats qui, pour des raisons qui appartiennent à eux seuls, ont, comme ils en ont le droit, préféré se tenir à l'écart de ce prétoire.

Sur cette considération générale, mais qui, je crois, est au cœur de l'exception soulevée par l'Australie que j'ai eu le très grand privilège de présenter, s'achève mon exposé.

Et j'en aurai terminé lorsque j'aurai précisé que cet exposé conclut également la présentation de l'Australie, et lorsque je vous aurai remerciés très vivement, Monsieur le Président, Messieurs les Juges, pour votre bienveillante patience.

The **PRESIDENT**: Thank you very much, Professor Pellet. So, Mr. Griffith, this completes the first presentation of Australia?

Mr. **GRIFFITH**: That is so, Mr. President.

The **PRESIDENT**: Thank you very much.

L'audience est levée à 12 heures.

FOURTH PUBLIC SITTING (15 XI 91, 10 a.m.)

Present: [See sitting of 11 XI 91.]

STATEMENT BY MR. MANI

AGENT FOR THE GOVERNMENT OF NAURU

The PRESIDENT: This morning we begin the oral presentation by Nauru, and first I will call upon the Agent, Professor Mani please.

Mr. MANI: Mr. President and Honourable Members of the Court, I seek permission to present the members of the delegation representing the Republic of Nauru in this case, who will be participating in the oral presentations.

I appear before this Court as a Co-Agent, Counsel and Advocate. I am a former Chief Secretary and Secretary to the Cabinet of the Republic of Nauru, and an expert in the affairs of Nauru. I am Professor of International Law in Jawaharlal Nehru University, New Delhi, India.

Mr. Leo D. Keke is the other Co-Agent, Counsel and Advocate. He is Presidential Counsel of the Republic of Nauru. He was the Minister for Justice of the Republic. He is an expert in Nauruan affairs. He is a Member of the Bar of the Republic of Nauru and of the Australian Bar.

His Excellency Hammer DeRoburt is the Head Chief and Chairman of the Nauru Local Government Council; the seniormost Nauruan Statesman, and an outstanding expert in Nauruan affairs; former President and Chairman of Cabinet and former Minister for External and Internal Affairs and the Phosphate Industry of the Republic.

Professor Ian Brownlie appears as Counsel and Advocate. He is a Member of the English Bar and Chichele Professor of Public International Law, Oxford, and also Fellow of All Souls College, Oxford.

Professor H. B. Connell appears as Counsel and Advocate. He is a former Chief Secretary and Secretary to the Cabinet of the Republic of Nauru and an expert in the affairs of Nauru. Professor Connell is Associate Professor of Law, Monash University, Melbourne, and a Member of the Australian Bar.

Finally, Mr. President, Professor James Crawford also appears as Counsel and Advocate. He is Challis Professor of International Law and Dean of the Faculty of Law, University of Sydney. He is a Member of the Australian Bar.

Mr. President, I seek leave of the Court to broadly indicate the order of presentation on behalf of the Republic of Nauru.

- His Excellency Hammer DeRoburt, Head Chief of Nauru, will open the Oral argument on behalf of the Republic. He will speak on certain key episodes in the development of Nauru's claims.
- Following him, Mr. Leo D. Keke will speak on the importance of rehabilitation to the Nauruan Community. He would like to present the present and long-term perspective.
- I would then deliver my Agent's speech.
- Professor Connell will then address the Court on the history of the issue of rehabilitation and the issue of good faith.

- Following this, Professor Ian Brownlie's first presentation will be on the history of the dispute, with particular reference to Australian arguments about delay and other issues.
- Professor James Crawford would then speak on the significance of the termination of the Trusteeship.
- Professor Brownlie would then complete his presentation by addressing the question of overseas assets of the British Phosphate Commissioners.
- Finally, Mr. President, Professor Crawford will conclude the presentation by speaking on the indispensable parties argument.

Thank you, Mr. President.

The **PRESIDENT**: Thank you, Mr. Mani. We now proceed to hear your Counsel, beginning with Mr. Hammer DeRoburt.

ARGUMENT OF MR. DEROBURT

SENIOR COUNSEL FOR THE GOVERNMENT OF NAURU

H.E. Mr. DEROBURT :

1. Mr. President and Honourable Members of the Court, I consider it a great honour and privilege to be called upon to address the highest international tribunal on behalf of the people of Nauru on a matter of crucial importance to the progress and prosperity of our country, Nauru.

2. Mr. President, as you are aware, the Republic of Nauru is perhaps the smallest democratic republic in the world, with an area of 21 square kilometres, and an indigenous population of a little over 5,000. True to the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, and much against the initial reservations in certain quarters, the United Nations strongly endorsed the claim of this small Pacific island community to self-determination and granted us unconditional independence on 31 January 1968. The people of Nauru are grateful to the United Nations for the role it played in guaranteeing the political and economic independence of our nation.

3. Nauru is a single island in the mid-Pacific whose principal source of income is its depleting phosphate deposits. By the time the Phosphate Agreement was concluded between the Nauruan Community and the Administering Authority in 1967, nearly one-third of the island had been devastated by mining under the Australian Administration. With the prospect of total exhaustion of phosphate reserves looming large on the horizon, and with the Australian rejection of Nauruan terms for resettlement on an Australian island, the Nauruan people were all the more determined to obtain acceptance by the Administering Authority of the simple principle that it bear responsibility for rehabilitation of phosphate lands to be mined-out during its Administration. This responsibility, the Nauruan Community believed, was moral as well as legal. For the same reason, we readily accepted the responsibility for rehabilitation of phosphate lands mined-out after we assumed control over the phosphate industry. This case, Mr. President, in simple terms asks the Court to recognize and declare the principle of the responsibility of Australia as the principal Administering Power to rehabilitate the phosphate lands mined-out during its Administration.

4. The Preliminary Objections of Australia seeks to show, among other things, either that the Nauruan Community had waived or renounced its rehabilitation claim or that the 1967 Phosphate Industry Agreement had effectively and conclusively settled this issue, along with other issues. As the Nauruan leader in the key period, I consider it to be my duty to reject, most categorically, the Australian interpretation of events on this score and clarify the Nauruan position as I saw it and perceived it.

5. The question of independence of Nauru was definitively raised in 1959, as the objective which the Nauruan Community had proposed to achieve in a phased manner, over a 10-year period. Australia then came up with the idea of resettlement of Nauruans in one of its islands. We had always been told that rehabilitation was impracticable, given the state of technology then available (we do not know if there was any other reason, left unstated by Australia, for persuading us to consider the option of resettlement). In the light of this we decided to consider the option of resettlement seriously and negotiated for minimum terms which would have ensured and preserved the national identity of the

Nauruan Community. But this was not to be. The negotiations broke down on this score and the Nauruan Community finally had no option but to abandon resettlement. It was not a capricious decision but one based on the fundamental need to preserve what was so dear to our hearts — the Nauruan Community. We had, after all, just been through a war in which we, as a people, had all but been obliterated. We therefore would not expect those under whose wardship we were would insist on a course of conduct which would have the result of assimilating us out of existence. Australians who thought about this understood the point well.

6. In fact, the independence negotiations dealt with three major issues: (1) political independence; (2) the control and future operation of the phosphate industry; and (3) rehabilitation of mined-out phosphate lands. Initially, the Administering Authority sought to delay the achievement of political independence by making negotiations for transfer of ownership of the phosphate industry difficult. Eventually, the Phosphate Industry Agreement was concluded in 1967.

7. The issue on rehabilitation figured throughout these negotiations, as evidenced by the records of negotiations and I draw the Court's attention particularly to Annexes 4 and 5 in Volume 3 of the Memorial of the Republic of Nauru.

8. The Nauru delegation, of which I was the leader throughout the talks, made a statement on the Report of the Australia-appointed committee to investigate the possibilities of rehabilitation of the mined phosphate lands on Nauru (this was commonly known as the Davey Committee Report). The Statement is attached to the record of the Phosphate Industry Discussion, Fifth Session, 29 June 1966, which is part of the Annex 4, I referred to. Under the heading "The Responsibility for Rehabilitating Nauru", paragraph 1 of Section B of the Statement most succinctly stated the Nauruan claim thus:

> "The Nauruan people have consistently claimed that it is the fundamental responsibility of the Administering Authority to restore the mined phosphate lands to their original condition. This responsibility stems in part from the obligation that the Administering Authority has, under the United Nations Trusteeship System, to safeguard the future of the Nauruan people. It also stems from the very large profits from past mining activity that the Administering Authority has chosen to distribute to phosphate consumers in Australia, New Zealand and the United Kingdom (that is by not charging world prices), instead of returning them to the Nauruan people as their due entitlement."

9. The Administering Authority was not prepared to accept this position. Thus, at the 10th Session of the talks on 29 June 1966 (Ann. 4), it was agreed "that inability to reach agreement on those matters would not necessarily hold up the rest of the arrangements".

10. The Nauruan delegation made several statements during the Nauru talks in 1967 (Ann. 5). The last paragraph of the Nauruan delegation's Statement 67/2 of 19 April 1967, was as follows:

> "The two matters of future rehabilitation and past rehabilitation are quite separate and distinct and we cannot see why Trust Powers should try to force us to abandon our sincerely held views regarding Government responsibility for rehabilitation as a precondition to any long term agreement." (Nauruan Delegation Doc. 67/2, Nauru Memorial, Vol. 3, Ann. 5, p. 555 at p. 558, i.e., internal pagination p. 140 at p. 143.)

At the afternoon session of 17 May 1967, the Nauruan delegation was specifically asked to agree to "an understanding on rehabilitation which would mean that the Nauruans would not continue to press this subject and link it with rights of immigration into Australia and New Zealand". In response the Nauruan Delegation Paper 67/8, of 18 May 1967 stated as follows:

> "The Nauruan delegation is disappointed that they should be asked to renounce their sincerely held beliefs on this (formally or informally) as one of the collective preconditions necessary to obtain agreement." (Nauru Delegation, Doc. 67/8, Nauru Memorial, Vol. 3, p. 523 at pp. 525-526, i.e., internal pagination p. 108 at pp. 110-111, para. 9.)

Again:

> "Apparently the Governments want to make even more money at our expense, as well as imposing a condition that we renounce all claims regarding the responsibility to rehabilitate the land already mined" (Nauru Delegation, Doc. 67/8, Nauru Memorial, Vol. 3, Ann. 5, p. 526, internal pagination p. 111, para. 12),

and again:

> "We are not prepared publicly or privately to accept the Partner Governments' view that the proposed financial arrangements are adequate to cover our future needs, including rehabilitation or resettlement." (Nauru Delegation, Doc. 67/8, Nauru Memorial, Vol. 3, Ann. 5, p. 527, internal pagination p. 112, para. 12.)

The record of the talks on the evening session of 16 May 1967, clearly stated that:

> " it emerged (this is the record of the talks) that the Nauruans would still maintain their claim on the Partner Governments in respect of rehabilitation of areas mined in the past, even if the Partner Governments did not press for the withdrawal of the claim in a formal manner, such as in an agreement." (Nauru Delegation, Doc. 67/8, Nauru Memorial, Vol. 3, Ann. 5, p. 466, internal pagination p. 51, para. 27.)

11. Thus, the talks that further led to the adoption of the Heads of Agreement for the Nauru Phosphate Agreement on 15 June 1967, did not deal with the issue of rehabilitation. The final Agreement relating to the Nauru Island phosphate industry of 14 November 1967, was based on those Heads of Agreement. The Phosphate Industry Agreement dealt with matters directly relating to the transfer of ownership of the phosphate industry, arrangements for the management of the industry on Nauru, financial arrangements and supply undertakings. It left the issue of rehabilitation to be pursued separately.

12. Soon after signing the Phosphate Industry Agreement on behalf of the Nauruan Community on 14 November 1967, I had the occasion to address the United Nations Trusteeship Council on 22 November 1967. Reporting to the Council on the progress achieved on the issues on which agreement was forthcoming with the Administering Authority, I specifically went on record as follows:

> "There was one subject, however, on which there was still a difference of opinion — responsibility for the rehabilitation of phosphate lands. The Nauruan people fully accepted responsibility in respect of land mined subsequently to 1 July 1967, since, under the new Agreement, they were receiv-

> ing the net proceeds of the sale of phosphate. Prior to that date, however, they had not received the net proceeds and it was therefore their contention that the three Governments should bear responsibility for the rehabilitation of land mined prior to 1 July 1967. That was not an issue relevant to the termination of the Trusteeship Agreement, nor did the Nauruans want to make it a matter for United Nations discussion. He merely wished to place on record that the Nauruan Government would continue to seek what was, in the opinion of the Nauruan people, a just settlement of their claims." (Australian Preliminary Objections, Vol. II, Annexes, Ann. 29, p. 247 at p. 249, para. 20.)

My speech in the Trusteeship Council, made with the concurrence and support of the Nauru Local Government Council, represented fairly where the Nauruan Community stood. We did not want independence held up by the ongoing dispute relating to rehabilitation. But we made it clear that the matter of the claim would persist after independence until resolved.

13. Paragraph 20 of the Records of the Fourth Committee of the United Nations General Assembly of 6 December 1967, which contains a statement made by me on behalf of Nauru, has been wrongly interpreted by Australia to amount to a waiver or renunciation of our claim. The point was canvassed here before the Court by Australia earlier this week.

14. Australia has rather tendentiously suggested that I might have missed my opportunity to raise the rehabilitation issue before the world because the nature of the claim was not revealed in the Fourth Committee. Nauru, as represented by the Nauru Local Government Council and myself, then regarded the 1967 sessions involving us in the Trusteeship Council and the Fourth Committee as very special and extraordinary. It was the eve of independence in January 1968. We did not regard the Fourth Committee session as the appropriate moment or venue to restate Nauru's position in regard to rehabilitation. Only a few days before, I had stated categorically and clearly to the Trusteeship Council, as I have earlier expressed, that the rehabilitation issue still stood but that termination of Trusteeship should not be held up because of that issue and was, therefore, not a matter of United Nations discussion. Furthermore, the Report of the Trusteeship Council meeting was already before the Fourth Committee and what I had said for Nauru in the Council was in that Record.

15. I was quite happy and satisfied with what I said then and still am. We had said, and continue to say, that Australia was and should be responsible for rehabilitation of pre-independence mined lands for the reasons we had given. Australia, on the other hand, did not agree with us and continues so to disagree. That was the "difference of opinion" I had mentioned in my statement to the Council. Perhaps it could have been said differently, as I sensed Australian representatives here seem to be suggesting. However, that was my way of describing briefly the two different positions. I had not said it then having in mind any proceedings in this distinguished Court, but hoping that we could negotiate a proper and just settlement, short of litigation. That is the hope of everybody but best intentions unfortunately do not always work out.

16. It had then been our constant experience that views we expressed in the Council on Nauru's problems would be duly conveyed in appropriate records to the Fourth Committee, thence to the General Assembly ultimately. We had never addressed the Fourth Committee directly on Nauru's problems thus in the ensuing Fourth Committee meeting at which I was honoured and privileged to attend on behalf of my people, the Nauruan Community. I had taken pains to say the things I wanted to say and expected by Nauru to say honestly and truthfully. It

was, after all, a time of parting between Nauru and the world body without whose many assistances Nauru would not have been where it is today. Our thinking, which has not changed, was that it was not a moment for any acrimony. The Fourth Committee was not the venue for Nauru at that moment to pursue anything against Australia or anybody. Nauru wanted me in the Fourth Committee to do and say what is right by the question of our independence which was at hand. We must convince the United Nations, which has very great responsibilities in its task of granting independence to Trust Territories that, despite our very small size and lack of natural resources, we could still become an independent viable nation. That was the Nauruan way of thinking and it still is. What I have just recounted did not run counter to anything previously said in the Trusteeship Council by me about another problem — rehabilitation.

17. The statement I had made in the Fourth Committee was meant to be also on behalf of the Nauruan leadership on Nauru so that we would be accountable by it also to our Nauruan Community who would wish to know whether there would be adequate means — money — to sustain their livelihood and well-being in the future. We believe there should be assurance to them on that point. We believe it was important that such assurance and commitment by us — the leadership — was announced in the presence of and, more importantly, to no less a body than the United Nations itself. The reality was then and still is that two-thirds of phospate lands completely mined would have to be rehabilitated by the Nauru Government. If this rehabilitation were not to be done, they — the Nauruan Community — will not be able to, and they will know that they will not be able to, live on Nauru with four-fifths of it physically unavailable for their use.

18. It was with these in mind that I had made the references to adequacy of funds. The problem was that revenue from phosphate mining will no longer be available in the foreseeable future. This was the problem in my mind. The statement was not meant to be an assurance to the United Nations and the Nauruan people that we will also meet the costs of rehabilitating the part of mined-out lands for which we hold Australia responsible.

19. Quite evidently, this statement in the Fourth Committee cannot, with any justification, be construed to be a waiver or renunciation, nor did other delegates at the United Nations perceive it to be so. Furthermore, Australia, from the beginning has never mentioned in writing or verbally to us that we had waived, from any point in time, our right to pursue with them the question of responsibility for rehabilitation. Their response has consistently been a reference to the "generous" provisions of the Canberra Agreement which they, more or less, maintained had absolved them from any responsibility for rehabilitation. It is only now, about 23 years later, beginning in the pages of their Memorial and Preliminary Objections to our case to this Court that a waiver of rights by Nauru is being introduced by Australia.

20. It is proper here, Mr. President, to state and I emphasize that at this time rehabilitation has been one issue on which there has been a consistent national consensus on Nauru. At the time of independence in January 1968, the Constitutional Convention of Nauru fully reaffirmed the stand taken by the Nauruan delegation at the talks leading to independence by inserting in the Constitution a provision, Article 83, Clause 2, denying the responsibility of the Government of Nauru for rehabilitation of mined phosphate land prior to 1 July 1967. Soon after independence, in Nauru's first Parliament in 1971, the Nauruan Parliament unanimously adopted a resolution calling upon prosecution of Nauru's rehabilitation claim. This national consensus remains as strong today as it was during the independence talks. The Nauruan Government has on its part continually kept Parliament informed of every major step taken in respect of the claim,

including the appointment of the Commission of Inquiry, tabling of its report in Parliament, the despatch of a copy of the report to Australia and finally the institution of proceedings in this Court.

21. After independence Nauru raised the rehabilitation claim time and again with Australia through letters and diplomatic notes and at bilateral meetings. In 1968 I raised the matter with the then Minister for External Affairs of Australia by a letter. On a State visit to Canberra in 1973, I raised it with the then Prime Minister for Australia. I raised it again, with the then Acting Minister for External Affairs of Australia when he visited Nauru in 1974. I wrote a further letter to the Prime Minister of Australia in 1983. Subsequently, Nauru sent diplomatic notes to Australia on the subject, all to no avail.

The recurrent bilateral contacts after independence indicated a clear divergency of views between Nauru and Australia, Nauru holding that the former Administering Authority had the clear responsibility to rehabilitate the phosphate lands mined out before 1 July 1967, and Australia denying such responsibility, contending that the question of rehabilitation was finally settled by the independence negotiations with provisions for adequate funds for rehabilitation and transfer to Nauru of all rights over the phosphate industry. In fact the Australian Prime Minister's letter of 1984 for the first time contained an additional assertion

> "The former Partner Governments agreed at that time that it was a requirement of termination of the Trusteeship Agreement that they were entirely cleared of any onus or financial responsibility for the rehabilitation of Nauru." (Memorial of Nauru, Vol. 4, Ann. 79, p. 529.)

22. After pursuing the matter for nearly two decades, the Government of Nauru thought it necessary and urgent to take a decision on what the further course of action should be. This was necessary because the issue had to be resolved; it was urgent because exhaustion of phosphate resources was drawing closer and closer, and considerable planning and organization had soon to be put in place before actual rehabilitation work started, given the immensity of the problem. Also, in view of the assertions contained in the Prime Minister's 1984 letter, it was felt necessary to study without much loss of time all relevant aspects of the issue of rehabilitation. Keeping all this in mind, the Nauru Cabinet appointed a three member independent Commission of Inquiry in 1986. The Commission was asked to enquire into the nature and extent of the responsibility for rehabilitation of worked-out phosphate lands prior to independence; and the cost of it.

23. The Commission of Inquiry comprised an eminent Australian Civil Engineer, Mr. R. H. Challen, and a senior Nauruan, Mr. Gideon Degidoa, with Professor C. G. Weeramantry a well-known international lawyer who was then Professor of Law in Monash University, Australia, as its Chairman. Mr. President, I think I have omitted to mention that one of the members of this Commission of Inquiry was Professor Connell of the Faculty of Law at Monash University. The former Partner Governments were cordially invited to assist in the Commission's work and even participate in its hearings. This they declined to do. After much study, investigation and public hearings, the Commission submitted its ten-volume Report on 29 November 1988. I believe copies of the Report have been made available to the Court.

24. Immediately following the receipt of the Commission's Report, copies of it were dispatched to the former Partner Governments, who had in fact been already kept informed of the Commission, and its proceedings. Indeed, even requests had been made on behalf of the Commission for access to certain

documents which were within the power or control of Australia and these requests proved unsuccessful.

25. The response of the three former Partner Governments to the Report of the Commission of Inquiry was essentially one of non-recognition and restatement of a denial of any responsibility in respect of rehabilitation.

26. Soon after the Nauru Commission of Inquiry was announced in 1986 there was also another development. Australian newspapers reported that the three former Partner Governments were on the verge of concluding an agreement to wind up the British Phosphate Commissioners (BPC). Nauru requested the three Governments to confirm this development and, if true, to refrain from distributing the BPC assets until after conclusion of the work of the Commission of Inquiry. I both spoke and wrote to the then Australian Minister for External Affairs in 1987. These approaches were brushed aside and the three former Partner Governments forthwith made arrangements to disperse the assets.

27. Very clearly, Nauru was of the view that all diplomatic endeavours at resolution of the rehabilitation issue since the days of the Trusteeship had reached a dead end, that it was now necessary to pursue other legal methods of dispute settlement. Judicial settlement is obviously one such method. The Cabinet of Nauru, on the basis of a formal submission, finally took the decision to institute proceedings before this Court against Australia in May 1989, after very careful consideration of the matter. Indeed, ever since independence the rehabilitation and issues of Australian responsibility had been a particular concern of the Nauru Cabinet, of which I was Chairman for the greater proportion of the time. It was hardly a matter of surprise then, that the Cabinet, with the strong support of Parliament and the Nauruan people, took the decision to have the matter settled with Australia in a proper and peaceful manner in a court of law.

I thank you Mr. President, and the other Members of the Court, for the courtesy of listening to what I had to say on behalf of the people of Nauru.

ARGUMENT OF MR. KEKE

COUNSEL FOR THE GOVERNMENT OF NAURU

Mr KEKE: Mr President and Honourable Members of the Court: it is a great honour for me to address this highest judicial forum as a younger representative of the Nauruan Community, following the opening statement by His Excellency the Head Chief of the Republic of Nauru. I shall focus on the importance to the Nauruan people of the restoration of lands mined-out during Australian administration of Nauru, and indeed, the rehabilitation of all lands.

Ever since its discovery in 1906, phosphate has played a crucial role in the shaping of the economy and social system of Nauru, perhaps the smallest democratic republic in the world. It provides the only vital source of revenue for the small Nauruan economy, supplemented now by income from investments from the phosphate industry since 1968. This is the reason why Article 83 (1) of the Constitution of Nauru expressly stipulates that "the right to mine phosphate is vested in the Republic of Nauru". This provision was deliberately included in the Fundamental Law of Nauru because the Fathers of the Nauruan Constitution realized only too well the need to protect and to ensure the inalienable rights of the Nauruan people to the sovereignty over the only natural resource.

The income from the sale of phosphate forms the principal item of revenue for the annual budget of the country. Requirements of public expenditure are met mostly from this revenue head. The annual budget is extensively discussed by the Nauruan Parliament before its passage. It makes allocations for items of expenditure on community health and medical services, education, public works, Nauruan housing, community services such as provision of water, electricity and youth services, civil aviation, telecommunications and so on. Each of these items is crucial to the welfare of the Nauruans, taking into account their special problems and Nauru's isolated geographical location.

Of a population of 5,000 indigenous Nauruans, about 2,000 are engaged in public employment in government, in the Nauru Local Government Council, or in the phosphate industry. Due to the nature of the intestacy laws, based on custom, nearly half of the population have rights of ownership of phosphate-bearing lands and are the recipients of interest from the landowners fund. That represents about two-thirds of the present Nauruan population. This is in sharp contrast to what Mr. R. Marsh, a senior official at the Australian Department of Territories, reported to his Minister on 4 October 1955. According to Mr Marsh:

> "Ownership of land is determined by native custom and a position had been reached where all the phosphate land is owned by relatively few persons." (See Australian Preliminary Objections, Vol. I, p. 26, para. 50; Vol. II, Ann. 3, p. 9 at p. 11, para. 18.)

Given the smallness of the population and the limited area of land, there does not exist much infrastructure for development of other large-scale industries, whether in the public or in the private sector.

Taking the dependence of the Nauruan people on the phosphate industry, and realizing that the income from phosphate must be rationally utilized so that with the eventual exhaustion of that resource, national revenue should not dry up, the leaders of the Nauruan Community have insisted that adequate funds be set aside to meet the various exigencies of the national economy. The result was the establishment of a system of four public funds a few days before independence, under the Nauru Phosphate Royalties (Payment and Investment) Act 1968-1989 — recently amended in 1989 — and the Nauru Phosphate Royalties Trust Act 1968-1990, subsequently confirmed by the Constitution.

These four funds are : (1) the Long-Term Investment Fund, established under Article 62 of the Constitution ; (2) the Nauruan Land-Owners' Royalties Trust Fund, for the benefit of the owners of the phosphate lands ; (3) the Nauru Rehabilitation Fund, for the purpose of restoring or improving parts of the Island of Nauru that had been affected by mining of phosphate since 1 July 1967 ; and (4) the Nauruan Housing Fund for erecting, repairing and maintaining housing in Nauru. These funds have a constitutional status. The Nauru Phospate Royalties Trust is also established by law and is responsible to Cabinet and accountable to the Nauruan Parliament for its management of these funds, which it is required to conduct in accordance with conditions laid down by the law.

All this clearly shows how vital a role income from phosphate plays in the current and future requirements of the Nauruan economy.

Depletion of phosphate deposits, expected in the near future, will adversely affect the economy. Unless equally reliable alternative sources of revenue are found, the exhaustion of this resource will undoubtedly cause severe strain, if not disruption, to the ongoing social welfare programmes of the State. Additionally, the Trust Funds will have to be suitably used on the basis of a well thought-out public policy, to assist the economy in its transition to a post-phosphate era. This itself is a formidable task. Despite this, the Nauruan Community has undertaken to rehabilitate the phosphate lands mined out by them since 1 July 1967, the date on which they gained control of the phosphate rights, by specifically setting aside the Rehabilitation Fund for the purpose, which will not be available for other economic tasks facing the country during the difficult period of transition into a post-phosphate economy.

Having enjoyed the abundant benefits of cheap Nauruan phosphate throughout its administration of the Territory, it would be neither fair nor equitable for Australia now to abdicate its responsibility to rehabilitate the phosphate lands mined out during its administration, and to claim that this burden should belong to Nauruans even as they prepare themselves for the daunting task faced by their small nation upon depletion of their natural resources.

Nauruans are very much attached to their lands. Their customary law determines the nature and extent of land rights and their transmission upon the death of a landowner. Even the extent of validity and scope of application of a will are determined in accordance with Nauruan custom which is fully recognized in the courts. Ownership to land and ownership to phosphate are indivisible and indistinguishable. To an ordinary Nauruan, income from phosphate is part and parcel of the land, as it arises from the land. In the same sense, the funds held by the Nauru Phosphate Royalties Trust are closely intertwined with this concept of ownership to phosphate land.

Nauruans' attachment to their lands, the role of phosphate revenue in their social and economic life, and the importance of rehabilitation of mined-out lands have all been part of the Nauruan lore. Names of places like the "Half-Penny Hill" on Nauru amply demonstrate the feelings and expectations of the Nauruans about the use of their lands by a foreign administration. The name is a reference to the rate of royalty paid by the Germans. Nauruans have never recognized any vested rights or title over their lands claimed by any foreign entity.

Rehabilitation of mined-out phosphate lands has always been a matter of central concern to the Nauruan Community. There are Nauruan folk songs dwelling on this theme. Nauruans were agreeable, albeit hesitatingly, to the proposal for resettlement on another island, only when advised by the Australian Administration that rehabilitation of the mined-out phosphate lands on Nauru was not feasible. However, when negotiations broke down on resettlement owing to the unwillingness of Australia to agree to an arrangement which would ensure preservation of their national identity, Nauruans had to accept the only option open for them, namely settlement on their own homeland. Also, the practicability of rehabilitation was confirmed by an expert committee appointed by the Australian Administration in 1966, strengthening the resolve of the Nauruan Community to pursue the goal of rehabilitation which alone would assist them in restoring the mined-out lands to a condition conducive to long-term human habitation. Nauruans find it difficult to understand why those who mined out their lands could not restore them and why Australia, which made the offer of resettling them on another island at its own expense, should now refuse to accept the responsibility to restore those lands in whose devastation it had taken such an active part.

Finally, Mr. President and Honourable Members of the Court, I wish to assure you that the Republic of Nauru has come before you seeking justice in right earnest. The Nauruan Community is, and has always been, serious about pursuing its rehabilitation claim against Australia. There exists a strong national consensus in support of this stand. It would appear that this seriousness and this social and national commitment of the Nauruan Community to the rehabilitation issue was not properly appreciated by Australia. The Preliminary Objections of Australia seek to belittle the Nauruan claim, suggesting that we are not serious about rehabilitation. On behalf of the Republic of Nauru and the Nauruan people, I most categorically dismiss any such allegations. The very fact that these allegations are made in a Preliminary Objection shows that Australia is unwilling to face the rehabilitation issue on merits. By contrast, it is a priority task of the Nauruan Government and people, and it is the essential reason why I am addressing you today.

Thank you, Mr. President and Honourable Members of the Court.

The Court adjourned from 11.20 to 11.40 a.m.

ARGUMENT OF MR. MANI

AGENT FOR THE GOVERNMENT OF NAURU

Mr. MANI: Mr. President and Honourable Members of the Court: it is a great honour for me to stand here and address the Court, representing the Republic of Nauru.

At the outset, Sir, please permit me to welcome the statement made by the distinguished Agent of the Commonwealth of Australia, Dr. Gavan Griffith, expressing on behalf of Australia a feeling of warm friendship and respect for the people of Nauru. Nauru reciprocates these sentiments most sincerely.

Mr. President, this is a case where Nauru, a small island State, perhaps one of the smallest republics in the world, long used to the peace and tranquillity of the Pacific, seeks justice before this highest international judicial forum against a great regional power under whose administration its people lived for nearly 50 years, first under a League of Nations Mandate, then under a United Nations Trusteeship. Being a small democratic State, Nauru has firm faith in the rule of law in the affairs of nations. It has firm faith in this Court as the dispenser of international justice. This is particularly demonstrated by Nauru's Optional Clause Declaration accepting the Court's jurisdiction with virtually no reservations.

THE FACTS IN PERSPECTIVE

Mr. President, in this case the Court should declare that each of the objections raised by the respondent State does not possess an exclusively preliminary character, in terms of Article 79, paragraph 7, of its Rules. This is precisely because the pleadings and oral presentations of both the Parties have revealed sharp disagreements in material respects over the facts of the case, and particularly because each of the Preliminary Objections is as deeply rooted in the merits as are the claims of the applicant State. A correct understanding of the facts of the case is material to the determination of each of the objections made by Australia. Although Australia has contended that each of its objections must be determined here and now, it has raised a good number of arguments on facts, often going deep into the merits — arguments which are denied or countered by Nauru.

Nauru has, in its written pleadings, already made an elaborate presentation of facts on which its claims are founded. Therefore, my attempt here will merely be to summarize these facts and to place them in their overall perspective.

Nauru's claims relate to the exploitation of its only natural resource, the phosphate, during the Mandate and Trust administration. Foreign powers and entities have successively claimed control over the resource and over the territory of Nauru and its people, in every case without their consent. The indigenous people of Nauru had no say in the selection of the Mandatory or the Administering Authority. Their phosphate-bearing lands, the lands whose ownership had always belonged to them by virtue of their own long-established custom, changed hands between foreign Governments and entities, solely for the benefit of those powers and entities. Nauruans would never know why they were colonized; why foreigners claimed rights over their ancestral lands and the only natural resource they had; why at the end of the First World War, just before the Mandate was put in place, there was a hurried negotiation resulting in the tripartite Nauru Island Agreement on 2 July 1919, as soon as it became known that the Territory of Nauru would become a Mandated Territory; why this Agreement was followed by the purchase from a German company of the alleged phosphate rights on 25 June 1920, barely six months before the Mandate; why under the Australian administration their phosphate was mined and sold to Australian farmers at cost price.

Despite the fact that the Mandate for Nauru was granted on 17 December 1920, the Indenture whereby the British Empire, comprising the United Kingdom, Australia and New Zealand, allegedly derived "rights" over Nauruan phosphate, was signed only on 31 December 1920, so that the phosphate workings could be operated by them in terms of the Nauru Island Agreement of 1919. Was all this compatible with the principle of disinterestedness, which was the foundation of "this sacred trust of civilization"? When this question was raised in the Permanent Mandates Commission as early as 1922, it was evaded by Australia. Subsequently, Australian representative, Sir Joseph Cook, stated in the Permanent Mandates Commission that:

> "The governments themselves (i.e., the governments of Australia, the United Kingdom and New Zealand) held and exploited the Concession . . . There was no phosphate company apart from the governments." (See Nancy Viviani, *Nauru's Phosphate and Political Progress*, Australia National University Press, Canberra, 1970, p. 48.)

Yet we heard Australia arguing the other day that the Nauruan claim over the British Phosphate Commissioners' (BPC) overseas assets had nothing to do with Australia, that it was a matter between Nauru and BPC, and that it should have been raised in 1967 with BPC!

The proprietary rights of the BPC were constantly questioned by the indigenous Nauruan people. However, Australia, by virtue of its legislative power over the Territory, ruthlessly gave effect to the régime of exploitation that had been envisaged in the 1919 and 1923 Tripartite Agreements. It is amazing that such a regime continued on Nauru until 1967 without material change, despite the transformation of the Territory from Mandate to Trusteeship.

The history of the Mandate and the Trusteeship administration is a history of steadfast struggle of the Nauruan people to assert their rights — the rights to land, the right to ensure the benefits of the nation's only resource, the right to regain control of their natural resource, the right to restoration of mined-out lands as far as possible to the original land uses, the right to self-government, and the unqualified right to independence. The United Nations Visiting Missions Reports, and the frequent talks between the representatives of the Nauruan people and the Administering Authority, reflect the constant travails of these people in seeking to attain these rights.

As early as 1959, the Nauruan Community had proposed a ten-year plan for achievement of independence. As if to forestall Nauruan independence, Australia persuaded the Nauruan community to believe that rehabilitation of the worked-out lands — an essential prerequisite for the long-term continuance of the people on Nauru — was impracticable, and used its Government Agencies, such as the Commonwealth Scientific and Industrial Research Organisation (CSIRO), to say so. Australia also offered them the possibility of resettlement in an Australian island. Given the experience of the people of the nearby Ocean Island (that is, Banaba), who resettled on a Fijian island under an arrangement which largely ensured protection of their national and social identity, the Nauruans thought that they would also receive similar treatment. They agreed to look at resettlement as a better option, as they were told that rehabilitation was impracticable. They agreed to consider resettlement in Curtis Island. The negotiations broke down, not because the Nauruan Community "unreasonably" rejected the "generous" resettlement offer — Australia now seeks to recreate a history of its own by such reinterpretations — but because Australia rejected the reasonable demand of the Nauruans that their national and social identity be protected and preserved. Were not the Nauruans entitled to make such a demand under the decolonization principles of the United Nations Charter and under the principle of self-determination?

Having reached a dead end in regard to the false proposals for resettlement, the Nauruan community fell back upon the only option they were left with — to remain in their homeland. They thought Australia, having enjoyed the benefits of Nauruan phosphate at cost price since 1920, would accept the corresponding obligations to rehabilitate the lands devastated, disfigured and rendered useless by their mining operations. But this was not to be.

The Australian counsel now argue that Nauruans had frequent changes of mind, often interspersed by periods of "eloquent silence". The "eloquent silence" allegation in respect of the rehabilitation claim clearly stands rejected in the face of the unequivocal records of the Nauru Talks, held in Canberra, and the proceedings of the Trusteeship Council and the General Assembly of the United Nations, and the subsequent exchanges. These will be recounted in further detail by counsel, Professor Connell.

In fact, one is not clear about what exactly Australia is now saying. Were the Canberra Talks or the General Assembly the proper forum to raise the rehabilitation claim? Was raising the claim before the Trusteeship Council inadequate, if it was not raised again before the General Assembly during its discussion of the Council's Report? Was the rehabilitation claim any different from an allegation of a breach of a Trusteeship obligation? When exactly does a breach arise of a trusteeship obligation? Are the obligations of States, under general international law, irrelevant, simply because they may have an alternative leg to stand on the trusteeship system? There is no doubt that these and similar questions, by their very nature, must impel this honourable Court to examine the merits of the Nauruan claims.

What Nauru does submit before this honourable Court, Mr. President, is that it has been wronged under the Trusteeship system and general international law, and that Nauru and the United Nations organs, in good faith, thought that Australia would stand by its obligations to rehabilitate the lands mined-out during Australian administration.

This, then, Mr. President, is the broad perspective within which Nauru has placed its claims before this Court for its adjudication.

ARTICLE 79 OF THE RULES OF THE COURT DOES NOT REQUIRE THE COURT TO CONSIDER AND DETERMINE AUSTRALIAN PRELIMINARY OBJECTIONS AT THIS STAGE

The distinguished Agent for Australia has submitted that Article 79 of the Rules of Court *requires* the Court to consider and determine all the Preliminary Objections of Australia at this stage.

Nauru does not see any such mandatory direction to the Court in Article 79 of its Rules. Nor is the Court prevented from joining with the merits phase of the case objections which do not possess, in the circumstances of the case, an exclusively preliminary character. This is particularly clear from Article 79, paragraph 7. The case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*), *Merits*, provided the Court with the first opportunity to rule on joinder of a preliminary objection with the merits under Article 79 of the 1978 Rules (see *I.C.J. Reports 1986*, p. 29, para. 38). Speaking of Article 79, the Court said in that case, as follows:

> "It thus presents one clear advantage: that it qualifies certain objections as preliminary, making it quite clear that, when they are exclusively of that character, they will have to be decided upon immediately but, if they are not, specially when the character of the objections is not exclusively preliminary because they contain both preliminary aspects and other aspects relating to the merits, they will have to be dealt with at the stage of the merits. This approach also tends to discourage the unnecessary prolongation of proceedings at the jurisdictional stage." (*I.C.J. Reports 1986*, p. 31, para. 41.)

It is thus clear that a declaration under Article 79, paragraph 7, that an objection does not possess, in the circumstances of the case, an exclusively preliminary character, does not bring to an end the consideration of the objection by the Court. The Court's discretion to deal with it along with the merits of the case remains unimpaired.

The Court's discretion to join preliminary objections to the merits in appropriate cases is also underscored by Article 8, paragraph (ii) (*b*) of the Resolution concerning the Internal Judicial Practice of the Court dated 12 April 1976, which provides that the Court while dealing with the merits phase of a case, shall address itself "on the global question of whether, finally, the Court is competent or the claim is admissible".

It would be inequitable to deny the Court — and the Court never meant to deny itself — such a discretionary power, having regard to the very complex nature of international litigation. After a study of the experience of the World Court illustrating several types of situations which will justify joinder, Dr. Rosenne, an eminent authority on the subject, states:

> "These situations have included those in which the issues raised in objections, whether issues of fact or issues of law, and those raised in the merits are too intimately connected to permit adjudication on the one without prejudging the latter; where the Court has not felt itself to be in possession of sufficient evidence, in the preliminary objection phase, to permit it to adjudicate on the objection in the confidence that it had full knowledge of the facts or was in a position to elucidate or evaluate them fully; where the Court found itself unable to determine in the preliminary objection proceedings whether the plea was strictly a preliminary objection or a defence to the merits; where an understanding regarding joinder had been reached between the parties; where the applicant submits a plea for joinder as an alternative submission; and more generally where the joinder is in the interests of the good administration of justice, having regard to all the circumstances of the case." (Shabtai Rosenne, *The Law and Practice of the International Court of Justice*, 2nd revised ed., Martinus Nijhoff, Dordrecht, 1985, pp. 464-465.)

The distinguished Agent for Australia referred to the 1970, 1971 and 1976 Reports of the Sixth Committee of the United Nations General Assembly to support a statement that "the Sixth Committee repeatedly disapproved of the practice of joining preliminary objections to the merits". All that these references show, Mr. President, is that there were views expressed in the Sixth Committee, but these were not the recorded view of the Sixth Committee as a whole. The Sixth Committee ordinarily makes its views known through the resolutions which it recommends for adoption by the General Assembly. Also, it is important to point out that the Court is the master of its own procedure, it is the principal judicial organ, *not a subsidiary organ*, of the United Nations.

There have always been differing views on whether or not the Court should join an objection with the merits if it does not possess an exclusively preliminary character. It is, however, for the Court to regulate its own procedure.

All that Article 79, paragraph 7, requires the Court to do is that, after hearing the parties, it shall give its decision in the form of a judgment, by which it shall either uphold the objection, reject it, or declare that objection does not possess, in the circumstances of the case, an exclusively preliminary character. Incidentally, it is interesting to note that the distinguished Agent for Australia did not use the term "exclusively" in his oral presentation although it appeared in the Verbatim Record subsequently.

The declaration that a preliminary objection does not possess an exclusively preliminary character merely represents a determination on the "preliminary" character of the objection, and nothing else. It is not a definitive determination of the objection as such, which cannot be made without a deeper study of the merits of the case. Article 79, paragraph 7, does not therefore *require* this Court to determine here and now all objections characterized by Australia to be preliminary objections.

The Australian Preliminary Objections and the oral presentations made before this Court on behalf of Australia have themselves amply demonstrated the close nexus that exists between the Australian objections and the facts on which the substance of their claims is founded, although, with due respect, Australia seems to have got most of its facts wrong.

The Republic of Nauru, therefore, submits that none of the Australian objections to the jurisdiction of the Court or to the admissibility of Nauru's claims or else to their receivability on other grounds possess an exclusively preliminary character, that each of them is closely bound up with the facts and merits of Nauru's claims, and that the Court, in the interests of justice, fairness and equity, must declare that none of them possesses an exclusively preliminary character.

THE AUSTRALIAN ALLEGATION OF WAIVER

The Australian pleadings and oral statements before the Court are replete with allegations of lack of good faith on the part of Nauru. The facts of the case indicate lack of good faith on the part of Australia in fact.

In 1966 to 1967 the talks between the two Parties specifically addressed the question of Australia's responsibility in respect of rehabilitation, which was specifically raised by the Nauruan representatives, whatever view the Australian counsel may take on the records of these talks. The Nauruans were specifically asked whether they could forego their rehabilitation claim, in view of the financial arrangements being settled through the negotiations. The Nauruans said no. It was then decided in view of the disagreement on this question to keep it aside from the agenda of the negotiations.

A perusal of the Records of the Nauru Talks at Canberra reveals a series of exchanges of views to prove this point. Here I refer to one or two such exchanges and I do apologize for the repetition of some of the quotations in this context. In the morning session of the talks dated 16 May 1967, the Secretary of the Australian Department of Territories, Mr G. Warwick Smith, O.B.E., advised the Nauruan delegation that:

> "On the question of rehabilitation the Partner Governments maintained that it was not for them to decide what should be done for rehabilitation; this was a decision for the Nauruans, financial arrangements could be such as to permit the Nauruans to do what they wished, within reasonable limits, in the way of rehabilitation. As part of the total arrangement the Joint Delegation would like to see the Nauruans withdraw their claims in respect of rehabilitation." (ND 67/SR 13 (Final), 10.30 a.m.-12.45 a.m., 16 May 1967, Nauru Memorial, Vol. 3, Ann. 5, p. 471, internal pagination p. 56 (given at top of each page.)

The discussion that took place in the afternoon session — as recounted by Mr. DeRoburt just before me — the same day on this point has been recorded as follows:

> "26. *The Secretary* asked would the Nauruans press their argument despite any financial arrangements made, that the Partner Governments had a responsibility for rehabilitation.
>
> 27. *During the following discussion* it emerged that the Nauruans would still maintain their claim on the Partner Governments in respect of rehabilitation of areas mined in the past, even if the Partner Governments did not press for the withdrawal of the claim in a formal manner such as in an agreement." (ND67/SR14 (Final), 4.30 p.m. to 6.20 p.m. 16 May 1967, Nauru Memorial, Vol. 3, Ann. 5, p. 466, internal pagination p. 51.)

At the next session on 17 May, Mr. Smith pointed out that the Joint Delegation's proposed phosphate agreement consisted of a package of several elements, including:

> "an understanding on rehabilitation which would mean that the Nauruans would not continue to press this subject and linked with rights of immigration into Australia and New Zealand" (ND67/SR15 (Final), 2.30 p.m.-3.30 p.m., 17 May 1967, Nauru Memorial, Vol. 3, Ann. 5, p. 460, internal pagination p. 45).

The Nauruan response to this was a lengthy paper entitled "Phosphate Proposals by Nauruan Delegation" which, on the specific point of a package deal seeking to extinguish the Nauruan claim for rehabilitation, said as follows:

> "*Rehabilitation*
>
> 9. The Partner Governments have restated their position that the proposed financial arrangements on phosphate over the future needs of the Nauruan community including rehabilitation or resettlement. The Nauruan Delegation is disappointed that they should be asked to renounce their sincerely held beliefs on this matter (formally or informally) as one of the collective pre-conditions necessary to obtain agreement.
>
> 10. The facts are that the Partner Governments have already rendered nearly one third of the island uninhabitable without having made any financial provision to restore the land that they have mined without our consent. The Nauruan people are prepared to take the financial responsibility of

> restoring land that is mined in the future when they are receiving the full economic benefits from phosphate. However, the need for rehabilitation stems directly from the mining operations and the Partner Governments carry their share of the obligation to restore the mined areas whether they have provided for this in the past or not.
>
> 11. The Nauruans preferred re-settlement as being a cheaper solution for the Partner Governments and ourselves. [That is, for Nauruans.] However, the failure of re-settlement proposals to provide a secure future and preserve our national identity has forced us into an expensive rehabilitation project because we are at least satisfied that we can obtain on Nauru a prospect of national survival that would be denied us under any alternative proposal that the Partner Governments have yet put to us.
>
> 12. However, the cost of any reasonable rehabilitation of Nauru is so large that we cannot understand why the Partner Governments are not content with the considerable benefits they have already obtained from the phosphate (about $150 million from 1949 to 1965 in the form of phosphate obtained at less than world prices). Apparently, the Governments want to make even more money at our expense as well as imposing a condition that we renounce all claims regarding the responsibility to rehabilitate the land already mined. Of course we know that little Nauru cannot force three important countries to make any such payments, but you also ask us to deny our beliefs. Whichever way we look at it the Nauruans are the main losers from the need to rehabilitate the island. We value the freedom that we can attain on Nauru sufficiently to face the cost of rehabilitating lands that we mine in the future, but we are well aware that our basic opportunities to survive as an independent people are being severely curtailed by such large expenditures on rehabilitation and we need every penny that we can get. We are not prepared publicly or privately to accept the Partner Governments' view that the proposed financial arrangements are adequate to cover our future needs including rehabilitation or resettlement." (ND67/8, dated 18 May 1967, Nauru Memorial, Vol. 3, Ann. 5, p. 523 at pp. 525-527, internal pagination p. 108 at pp. 110-112.)

It may be noted that this statement was formally read by the Nauruan delegation during talks on 18 May 1967 (see para. 9 of the Record of Discussion, ND67/SR16 (Final), 2.40 p.m.-4.40 p.m., 18 May 1967, Nauru Memorial, Vol. 3, Ann. 5, p. 455, i.e., internal pagination p. 40).

These exchanges took place in 1967, despite the agreement between the Parties arrived at during the tenth session of the Talks on 29 June 1966:

> "The discussion on rehabilitation and resettlement suggested that inability to reach agreement on those matters would not necessarily hold up the rest of the arrangements." (Nauru Talks, Record of Proceedings, 10th session, 29 June 1966, 10.30 a.m., Nauru Memorial, Vol. 3, Ann. 4, p. 391, internal pagination p. 111 at p. 112.)

Subsequently, however, the Talks did not, for obvious reasons, deal with the rehabilitation claim as it was agreed that the mutual disagreement on it should not hamper progress on other items on the agenda.

It was not, therefore, a matter of surprise that the Canberra Agreement of 1967 did not deal with this. Yet, Australia has seen it fit to interpret this as evidence of waiver, in the face of such explicit records of exchanges in the 1966 and 1967 Talks.

THE DISMISSIVE ATTITUDE OF AUSTRALIA TO THE DISPUTE

Mr. President, I will now briefly deal with the general attitude of Australia to the dispute, which we would call the "dismissive attitude". The entire history of the Nauru claim of rehabilitation and the related claim over the overseas assets of the British Phosphate Commissioners (BPC), as also the Australian pleadings and oral statements reveal a pronounced attitude of dismissiveness and self-righteousness on the part of Australia.

Australia is "surprised" to face a "new and unexpected claim". The Canberra Agreement is presented, selectively, as the final act in a colonial drama beyond which no colonial claims could raise their heads. Counsel for Australia said that the assertion of the rehabilitation claim before the United Nations Trusteeship Council was "too late and addressed to the wrong audience". "Any attempt to preservation of claims had to be made before the Canberra Agreement was signed, not after. And it had to be made directly to the Partner Governments", said the Australian counsel. Yet, the counsel elsewhere complained that the issue was not raised before the General Assembly. How many repetitions are good enough to ward off an allegation of implied waiver?

In fact, the dismissive attitude of Australia runs through the whole development of the case even after the independence of Nauru. It is reflected in the exchange of official correspondence between the Parties. The attitude has many manifestations — that the claims were all settled in 1967, by a generous financial agreement, that Nauru was not serious about its claims, or about rehabilitation as such, that Nauru by raising these claims now shows lack of good faith, and so on.

THE "GENEROSITY" ARGUMENT

Mr. President, Australia has also repeatedly argued that the financial arrangements under the Phosphate Industry Agreement of 1967 were "generous" on the part of the Administering Authority. Were they really generous in regard to the sale of the British Phosphate Commissioners' operations in Nauru? In regard to Nauru's rehabilitation claim? In regard to the "transfer" of phosphate rights to Nauruans? Generosity implies entitlement, and entitlement implies merits. The argument from generosity is thus a clear indication that the issue is not an exclusively preliminary one.

Under the 1967 arrangements, Nauruans were compelled to pay for the "purchase" of phosphate rights which had been rightfully theirs under customary law. Their reaction to the question of "transfer" of phosphate rights during the Nauru talks in Canberra in 1967, was quite predictable, as the following statement demonstrates:

> "*Phosphate Rights*
>
> 8. The Nauruan people have never acknowledged that the Partner Governments possessed any rights to Nauruan phosphate, and maintain that it was originally mined against our will and without our consent. Hence the Nauru Local Government Council could not sign their names to an agreement in which one of the Heads of Agreement was the extinction of the rights claimed by the Partner Governments. The Partner Governments may choose to make a unilateral declaration to this effect if they wish but the Nauruan people would not consider this in any sense a legal or moral claim for any form of compensation, since any prior claims of this kind would

> presumably be inoperative when the Partner Governments have met their obligations as United Nations Trustees and have helped Nauru to attain its independence." (Doc. Nauruan Delegation 67/8, Nauru Memorial, Vol. 3, Ann. 5, p. 525, internal pagination p. 110.)

If this view, which gained the support of the United Nations General Assembly in 1966 was correct, where was the "generosity" of the former Partner Governments in allowing the Nauruans to "purchase" the BPC phosphate operations on the Island at a price of $21 million, under an agreement which obliged Nauru to sell phosphate "exclusively to Partner Governments", "at the rate of two million tons per annum or as near thereto as possible"? (See Article 5 of Nauru Island Phosphate Industry Agreement, 1967, Nauru Memorial, Vol. 3, Ann. 6.)

Was the Australian generosity reflected in the various public funds created? The public funds established during the Australian administration were established at the insistence of the Nauruan Community. The corpus of these funds came from the phosphate royalties to which Nauruan landowners were entitled. They accumulated from further royalties and income from the funds themselves. This is a case of a claim of generosity by a guardian for acts he was persuaded to perform by his ward, and that too at the latter's expense!

Mr. President, Australia has presented yet another case of generosity by contending that the 1967 Agreement represented a premature termination of the concessionary rights of the Partner Governments, as their "rights" would otherwise have lasted until the year 2000.

The so-called concessionary rights were of dubious legal character, in view of the Mandate and Trusteeship obligations, and cognate obligations under general international law. Yet these "rights" had to be "purchased" by Nauru. The sale took place after years of enjoyment by Australia of the benefits of a cheap supply of high grade phosphate rock, virtually at cost price, which correspondingly deprived the Nauruan landowners of their right to a fair price for their phosphate, and also to the post-exploitation use of their lands.

A final aspect of "generosity" surfaces in the context of the rehabilitation claim. Having enjoyed since 1920 the cheap and uninterrupted supply of high grade phosphate from Nauru, Australia has consistently argued that the 1967 Agreement and the arrangement of the Trust Funds ended all its responsibility in respect of rehabilitation. Australia says: "we have given you enough funds. They will accumulate at the rate of $10 million a year. Don't be greedy."

In fact, Australia has given Nauru nothing. The Nauruan Community had to purchase what in fact were their own phosphate rights, and the BPC assets which at the first instance arose out of phosphate earnings, that is, earnings from Nauruan phosphate of which Nauruan Community had been deprived (see Articles 8, 11 and 12 of the Nauru Island Agreement, 2 July 1919).

The Trust Funds, such as the Long-Term Investment Fund and the Rehabilitation Fund, belonged to the Nauruan Community. These funds were formed out of phosphate royalties, they grew from them and from income earned on them. Australia did not contribute a cent to these funds. Australia claims to have been generous, still.

On a matter of detail about the "generosity" argument, if I may digress a little, Mr. President. The distinguished Agent for Australia was good enough to point out one error in a calculation made by Mr. Ken Walker in his statement annexed to Nauru's Written Statement. We are grateful to him for drawing our attention to it. We apologize for the error in the conversion of A$2130 into United States dollars, and we stand corrected. However, the substance of

Mr. Walker's statement remains unaffected. What Mr. Walker says in his statement is that: "In terms of standard of living the relevant income per capita figure in 1966-1967 was A$776 not A$2130." (See Nauru Written Statement, p. 163, para. A6.)

Standards of living refer to the income that is available to purchase goods and services, and in most countries it is appropriate that savings be included since the income derived can be used to purchase goods and services, or savings itself can be drawn on to purchase goods and services. The position in Nauru is quite different. As the Written Statement points out, the Nauruan Community did not and does not have ready access to the monies transferred to the Trust Funds (and the income earned by those Trust Funds) themselves. Most of the Trust Funds themselves cannot still be accessed by the Nauruan Community, and certainly were of no relevance to standards of living in 1966-1967, even if technically (by the standards of other economies) part of per capita national income.

In other words, Australian calculation of Nauruan living standards at independence — indicating Australian "generosity" — represents a gross exaggeration in real terms, having regard to the need of Nauru to find substantial resources against the depletion of the phosphate.

Lack of Good Faith: Australian Allegation of Financial Mismanagement by Nauru

Australia has further questioned the *bona fides* of Nauru and Nauru's conduct in bringing these claims before this Court. It has alleged Nauru's failure "to act consistently and in good faith" in relation to rehabilitation. It attributes this lack of good faith to Nauru's failure to take any steps to restore at least part of the phosphate lands mined-out after 1 July 1967. It is alleged that Nauru has raised the current claims against Australia simply seeking to raise additional monetary resources, as it had failed to "manage properly the potential wealth it inherited at the time of independence" (Preliminary Objections of Australia, Part V, Chap. 2, pp. 162-163, particularly para. 404).

Allegations of lack of good faith on the part of a State making an international claim should not be raised before this Court without a valid factual basis. Nauru's claims are founded on international law; they arose from the past conduct of the respondent State and its refusal to accept its responsibility with regard to them. On the contrary, the Australian allegations of lack of good faith are irrelevant to the adjudication of legal aspects of Nauru's claims. They are also unfounded in fact.

It is not open to the Respondent to sit in judgment over the manner in which the Applicant has managed its economy. There may be differences of views on the manner in which a State should manage its economy, but every State has a sovereign right to determine how best its economy should be managed. Questioning such a right amounts to intervention in the internal affairs of a State. The effect of Australian allegations is precisely that. It is a pity that such allegations have been made before the world's highest judicial forum. The Court will have noted, in contrast, that Nauru, in its Written Statement, responded to Australian arguments within the bounds of law. I should add here that Professor Connell will, in due course, provide details of the various long-term funds established and maintained by Nauru.

The Australian argument appears to be that, at the independence of Nauru, Australia ensured that Nauru was generously provided with sources of funds which would have been more than adequate for the rehabilitation of Nauru but, that the Government of Nauru, having mismanaged its economy, now finds that it requires more funds and, hence, has brought the current proceedings against Australia. Nauru's case is that the rehabilitation of lands mined-out before 1 July 1967 is the responsibility of the former Administering Authority, that the 1967 arrangements specifically omitted to extinguish this responsibility, that there exists a legal dispute between the two Parties and that the current financial position of Nauru has no bearing whatsoever to Australia's responsibility as to rehabilitation.

Mr. President, an accusation as serious as that of bad faith virtually invites the Court to turn to the merits, since such an accusation is essentially one of fact and one that permeates the entire claim, going to its very basis. Even on the Australian Agent's rather narrow definition, it is a matter which goes to the merits. It certainly does not possess an exclusively preliminary character.

LACK OF GOOD FAITH AND NAURU'S CONDUCT IN REGARD TO REHABILITATION OF PHOSPHATE LANDS WORKED OUT AFTER 1 JULY 1967

The Constitution of the Republic of Nauru contains the following provision in Article 83:

> "83. (1) Except as otherwise provided by law, the right to mine phosphate is vested in the Republic of Nauru.
>
> (2) Nothing in this Constitution makes the Government of Nauru responsible for the rehabilitation of land from which phosphate was mined before the first day of July One thousand nine hundred and sixty-seven."

This provision was inserted in the Constitution by the Nauruan Constitutional Convention of 1968 quite deliberately. It clearly reflects the sincerely held views of the Nauruan community which were consistently put before the Administering Authority, and before the United Nations. It is not suggested that it is relevant in establishing the Nauruan claim, since a State cannot do that by relying on a provision of its internal law. But it is certainly relevant as showing consistency and good faith in relation to the issue which underlies this case.

When phosphate is mined out, the land is wasted. On Nauru, the effect of mining on land is quite different from other countries. The mining devastates the land leaving nude limestone pillars called coral pinnacles. As the United Nations Visiting Mission said in its 1962 Report:

> "... and then, as we looked closer we saw for the first time the strange sight of the worked-out phosphate lands. We had heard descriptions of this derelict area before, but it is impossible to imagine in advance the extraordinary picture which it presents — acres of barren, sharp, coral pinnacles like huge, jagged, crowded gravestones, a forbidding reminder that about a third of the phosphate of the island has already been extracted." (See The United Nations Visiting Mission to the Trust Territories of Nauru and New Guinea, 1962, *Report on Nauru, Trusteeship Council Official Records*, 29th Session, 31 May-20 July 1962, Suppl. No. 2, para. 20, reprinted as Annex 11 in Nauru Memorial, Vol. 4, p. 102 at p. 108.)

In this context, I invite the Court's attention to Photograph 2, in Volume 2 of the Nauru Memorial, containing an aerial view of the mined-out phosphate lands. Nauru is aware that rehabilitation is a complex task, given the peculiarities of the problem on the island. The appropriate technology has to be harnessed but, more importantly there should be a general well-integrated town planning, maximizing considerations of economy and overall development of the nation. One has to look at the totality of the land mined out, both before and after 1 July 1967. Also, in view of the Constitutional dictate, the question of responsibility for rehabilitation of lands mined out before 1 July 1967 must be resolved.

The Australian administration itself did not take any action in regard to rehabilitation. It in fact consistently sought to avoid the issue of responsibility by diverting attention to resettlement on unacceptable conditions, or by seeking to establish that rehabilitation was impracticable because it was too expensive. On the other hand, Nauru has had a step-by-step approach to the whole issue. These steps have been referred to in Part I, Section 4, of the Nauru Written Statement (pp. 14-22).

The Nauru Phosphate Corporation and the Nauru Government Department of Island Development and Industry have been taking steps in respect of planning for rehabilitation.

In view of the eloquently negative attitude of Australia, the Nauru Government set up in 1986 a Commission of Inquiry mandated to reach findings not only on the question of responsibility for rehabilitation of lands mined-out before 1 July 1967, but also on the economic and technical feasibility of rehabilitation of the *whole* phosphate lands. The Commission submitted its findings in a ten-volume report in 1988. Its findings included elaborate recommendations on town planning and on the economic and technical feasibility of rehabilitation. Nauru is convinced that rehabilitation is not only technologically feasible, but economically practicable.

The Government of Nauru has already put in place a trial project to assess the technical problems involved in rehabilitation. The Australian aside on this count notwithstanding, the project has to follow its own pace, given the peculiar features of the task on Nauru. Rehabilitation on Nauru is just not levelling mine pits with sand or soil. It is much more than that.

Nauru strongly denies any suggestion by Australia that Nauru itself has shown lack of good faith in respect of rehabilitation of lands mined-out after 1 July 1967. Australia's perception of the issue has been rather simplistic. The Court would need to go into the merits of the question more deeply than it can possibly do in the Preliminary Objection phase, in order to determine the issue. In fact the Australian suggestion reflects its general attitude of dismissiveness towards Nauru's claims — and that attitude itself calls for the closest attention of the Court.

LACK OF GOOD FAITH AND DELAY

Mr. President, yet another point I wish to deal with would relate to questions relating to delay and good faith. Australia argues that Nauru has shown a lack of good faith (and perhaps abused the process of the Court as well) by bringing in its claims "after 24 years" or "more than 20 years". I do not know which figure is acceptable to Australia.

Nauru categorically rejects this allegation. Nauru's rehabilitation claim is rooted into its colonial past. The people and the Territory of Nauru were a "sacred trust of civilization". Exclusive enjoyment of the benefits derived from the continuous exploitation of their only natural resource casts on the Administering Power an obligation to assist in restoring the mined-out lands as far as practicable. Australia was constantly reminded of this by the Nauruan people.

but effectively avoided performance of this obligation. At the time of independence, the Nauruans thought that there would be scope for further negotiations. But Australia refused to negotiate.

Counsel for Australia says that for the first time after 24 years Nauru has now raised the issue as a legal claim. This wholly ignores the various official exchanges and ministerial talks that took place between the two countries. Perhaps they were not "legal" enough, as if diplomatic correspondence has to be conducted on legal letterhead over the phrase "without prejudice". But while the Australian counsel refers to and selectively interprets letters of the President of Nauru, there is not a word about the type of responses these letters evoked from Australia — responses which clearly demonstrated a very live awareness of Nauru claims.

On the selective use of documents by Australian counsel, I need only to point to such a selective use of Mr. DeRoburt's statement before the Fourth Committee of the General Assembly, on 6 December 1967. I would ask the Court to please note the extracts of this statement found at page 78 of the verbatim record of the public sittings of the Court of 11 November 1991, and page 24 of the verbatim record of 12 November 1991. Both the extracts omit the following significant sentence found in the General Assembly official records: "that phosphate was a wasting asset was, in itself, a problem: in about 25 years' time the supply would be exhausted" (see General Assembly, *Official Records*, 22nd session, Fourth Committee, 6 December 1967, 11.20 a.m., p. 395, para. 20, lines 13-16). The prospect of drying up of phosphate revenue was, then, the problem — *the* problem — which the Head Chief of Nauru was referring to, in the context of the financial resources Nauru had received in the past and would receive in future, which would assist Nauru to solve "the problem". Not the problem of rehabilitation, as the Australian counsel wanted the Court to understand.

Similarly, the allegation of delay is based on Australia's own misinterpretation of the facts. Nauru submits that Australia's arguments based on delay must be dismissed for want of legal and factual basis. There was no delay, indeed if anything there were repetitive attempts made by Nauru to raise its claims.

Another difficulty with the delay argument is that it implies survival of the obligation to rehabilitate well beyond the termination of the Trusteeship. Australia should not be permitted to have it both ways: it should either be that the termination of the Trusteeship extinguished this obligation or that no such extinction took place. Nauru argues that the latter is the case, that is no such extinction took place. Indeed, the claim in respect of the overseas assets of the British Phosphate Commissioners became actionable only upon determination of the BPC in 1987, and not before. Any argument of delay in respect of this claim is absurd.

AUSTRALIA'S CONTENTION THAT NAURU HAS COMMITTED ABUSE OF THE PROCESS OF THIS COURT MUST BE DISMISSED AS AN INNUENDO HAVING NO BASIS IN LAW OR FACT

Yet another point raised by Australia related to the question of the abuse of the processes of this Court. The Australian attitude of dismissiveness towards the Nauruan claim has also taken the shape of the contention that Nauru, by bringing in its claims before this Court, has abused the process of the Court.

Nauru categorically denies any such suggestion. Nauru's appeal to this high tribunal was made in all sincerity and earnestness. Nauru invites the Court to examine carefully its claims and the facts on which they are based before passing a judgment on such Australian allegations.

The Australian Co-Agent argues that the Court has inherent powers to strike off a case from its list on the ground of *mala fides* or abuse of process of the Court. He refers to the concept of inherent powers of a court under the common law system.

Mr. President, while I have great respect for the common law system, where, in fact, I have my roots, I must say that international law is not the same as the common law. This Court is bound to apply international law, in terms of Article 38, paragraph 1, of its Statute. The procedural concepts of particular national legal systems cannot simply be transported into international law, lock, stock and barrel. A municipal court has certain inherent powers of this kind because of the special features of the municipal law. By contrast, in international law, the scope for the Court to claim implied powers is rather limited. The Statute does not permit the Court to assume such inherent powers as the concept of abuse of the process of court contemplates.

Most of the arguments made by Australia, attributing to Nauru alleged lack of good faith or abuse of the Court's process, in fact, arise from a lack of clear understanding of the facts of the case and the history of the Nauruan claims, as also from a tendency to attribute motives to a small regional neighbour which has managed to follow an independent foreign policy ever since its independence, a people who are proud of their nationhood, however small their nation may be.

For these reasons, and because of the general approach taken to the case by Australia, Nauru humbly submits that none of the Preliminary Objections of Australia possesses an exclusively preliminary character.

THE CLAIMS HAVE NOT CAUSED ANY PREJUDICE TO AUSTRALIA

Australia has argued, perhaps as an extension of the delay argument, that Nauru, by instituting these current proceedings, has caused prejudice to Australia. The alleged prejudice is two-fold. First, since the case goes far back, even to the Mandate period, Australia is prejudiced because it does not have the records relating to that period. But it is far from clear, even in principle, what such records would reveal which is not already under quite extensive public record. In this respect, may I refer the Court to the various detailed studies on the development of Nauru and of the phosphate industry on Nauru.

Secondly, there are more substantive points of prejudice, says the Australian counsel. This arises from the facts (1) that Australia has been sued alone and not with the other two members of the Administering Authority, (2) that Nauru seeks to apply current standards of environmental protection, and (3) that the matter was not raised before the United Nations bodies at the relevant time.

Nauru fails to appreciate these arguments as points of prejudice. At any rate, each of these points will be dealt with by other counsel appearing on behalf of the Republic of Nauru. Just on the point of application of current standards of environmental protection, it is submitted that there has always been an obligation on the part of the miner to rehabilitate mined-out land. In the case of Nauru, the relevant German law provided this. The so-called takeover of the rights of the Pacific Phosphate Company by the three Partner Governments in 1920 did not extinguish the original Concessionnaire's obligations under the German law, under which the original concession was granted. These obligations particularly included the obligation of rehabilitation. It was the repeal by Australia in 1922 of the relevant German law that put an end to that obligation.

And nothing was done by Australia in the exercise of its full powers over the Island to create any alternative obligation.

Mr. President, it does not need any elevated environmental standard to appreciate the problem presented by a landscape such as that shown in the photographs in Volume 2 of the Nauru Memorial. The environmental degradation is patent.

In other words, Australia has not proved any prejudice and certainly it has not done so at this preliminary stage.

Mr. President, Honourable Members of the Court, that concludes my statement on behalf of the Republic of Nauru at the moment.

The Court rose at 12.50 p.m.

CR 91/19

FIFTH PUBLIC SITTING (18 XI 91, 10 a.m.)

Present: [See sitting of 11 XI 91; Judge Lachs absent.]

ARGUMENT OF MR. CONNELL

COUNSEL FOR THE GOVERNMENT OF NAURU

Mr. CONNELL: Mr. President and Members of the Court, it is an honour to plead before you and to present to the Court on behalf of the Applicant, the Republic of Nauru, arguments with respect to two matters, the history and development of the rehabilitation issue, and the nature and identity of the various funds arising from some of the proceeds of Nauruan phosphate.

On Monday, 11 November 1991, the distinguished Agent of the respondent State used the rather startling phrase "new and unexpected claim", with reference to the Nauruan claim concerning rehabilitation. That was far removed from reality. "New" it was not, and it could only have been unexpected if the respondent State had been unexpectedly blind to the issues. Nothing in the history of Nauru has been more to the forefront that the concern of the Nauruan people for their devastated lands. In order to demonstrate this, Mr. President, I am necessarily going to have to refer to the facts in some detail. Although references are given to particular quotations, more detailed authorities supporting what I am about to say are contained in Volume 1 of the Nauru Memorial.

The people of Nauru, early in the history of mining, going back to the 1920s queried the Australian administration why their land should be ruined for the benefit of others. From that day there has been a continuous struggle to redress what to the Nauruan people was a perceived wrong.

The nature of the problem is graphically illustrated in the photographs contained in Volume 2 of Nauru's Memorial. In particular, the Court is referred to photograph 2, which starkly portrays a low aerial shot showing the completely pitted landscape. The broad extent of the problem is displayed in photograph 1, whilst the extent of the mining which was carried out by the British Phosphate Commissioners, known as the BPC, is shown on map 2 of that Volume.

MEANING AND USE OF THE TERM "REHABILITATION"

"Rehabilitation" is a term constantly used in the case, and it is important that its scope and meaning is understood. In the Report of the Commission of Inquiry into the Rehabilitation of Worked-Out Phosphate Lands of Nauru, known as the "Weeramantry Report", the following meaning was attributed to it:

> "*(a)* returned the land to its former state — or as near to the former state as is reasonably practicable — and this includes revegetation. This concept usually relates to grasslands or forest of low commercial value;
>
> or
>
> *(b)* reforming the land to a shape and condition suitable for a nominated land use" (Republic of Nauru, Commission of Inquiry into the

Rehabilitation of Worked-Out Phosphate Lands of Nauru Report, p. 1133, commonly known as the "Weeramantry Report".)

The Court has been told more than once in the last few days that the Commonwealth Scientific and Industrial Research Organisation (commonly referred to as the CSIRO) Report of 1954 suggested that rehabilitation was impracticable. What needs to be understood, however, is what meaning is there attributable to rehabilitation. The enquiry by CSIRO was directed by the Australian Government to enquire into regeneration of the land specifically for agricultural purposes, which it found not to be a "practical possibility" (Preliminary Objections of Australia, Vol. II, Ann. 14). It was really not until the Davey Committee Report of 1966 (a year before independence) that a more wide-ranging and multi-faceted inquiry into the scope of rehabilitation was undertaken. The Report of the Davey Committee pointed out that "agricultural use is not the only possible objective for land restoration".

Rehabilitation, in reality, is the process carried out to the point prior to implementation of a planned land use. On the mined plateau of Nauru there may in the end be many designated land uses, of which the most common would be roads, airport, farms for pigs, poultry or vegetables, urban residential use, urban public use, forest and dams. In other words, rehabilitation would be reforming or returning the mined-out lands to a suitable state to allow for a more congenial environment for the Nauruans when the phosphate deposits will be exhausted (Davey Committee Report, Nauru Memorial, Vol. 3, Ann. 3, p. 211).

The rehabilitation process is the conversion from the mined site to a site, which in the words of the Weeramantry Report, has "such a suitable surface condition, consolidation of subgrade, and final level or contour as is specified or required for the planned future land use of the site" (p. 1134). The Weeramantry Report further described these activities to include, as appropriate,

> "removal or destruction of the dolomitic limestone pinnacles and other boulders, recovery of exposed residual or subsurface phosphate, excavation or building up of site, crushing of limestone or backfill, consolidation of the subgrade and addition of topsoil" (p. 1134).

It was that process that was considered both practical and cost-feasible by that Report.

However, the Court is respectfully reminded that the Weeramantry Report did not believe that even with careful planning that the task would be completed within one generation. So that when Australia stated last Monday that following General Assembly resolution 2226 (XXI) it was not expected that the task would be completed within the two years leading to independence — that would have been entirely correct. It was never considered that it would be completed within that time scale. This was one of the factors that necessitated separate negotiation and arrangement, as it would extend far beyond the date of independence, unless independence was to be delayed unacceptably both to the Nauruan people and the United Nations.

The need for such massive rehabilitation is brought about by the essentially destructive nature of the extractive mining (see photographs 5 and 7 in Volume 2, Nauru Memorial). The phosphate rock between the limestone pinnacles is mined to a depth of from 12 to 50 feet, and once extracted there are left giant forests of limestone pinnacles. The land is rendered useless. The landowner has nothing upon return of his land other than an empty shell of the lands.

HISTORY OF THE REHABILITATION PROBLEM

A. The Mandate

I turn now, Mr President, to some early considerations of the nature of mining and an early attempt to contain the problem under the Mandate.

The manner in which Australia achieved its preeminent status on Nauru and its reasons for doing so are recorded in detail in Part 1, Chapter 2, of the Nauru Memorial, and in Barry Macdonald's paper produced by the New Zealand Institute of International Affairs *In Pursuit of the Sacred Trust* (Chap. 1). By way of interpolation, I recall that the Australian Counsel, Professor Pellet, by way of an aside, mentioned the affection that Nauru appears to have for Dr. Macdonald's paper. This prompts me to mention in passing another study, in which Dr. Macdonald played a major role as an author with Maslyn Williams, *The Phosphateers*, a work published in 1985. That work was commissioned not by Nauru but by the British Phosphate Commissioners to inscribe their place in history. It was so revealing that the BPC records used in the compilation of that work have been kept away from public gaze in the Australian Archives, whilst Macdonald's own research materials have been embargoed and placed under lock and key in the New Zealand Archives! The book appears without footnotes.

The comment is a useful antidote to the thought that the respondent State is somehow under some prejudice with respect to documentation so jealously guarded by itself. In reality this is an instance where it is the Applicant who is being shut out.

With the Mandate settled, and the Australian Administration firmly in place, the rate of mining was stepped up. The Nauruans realized soon enough that the habitability of the island was at stake. The first Administrator, General Griffiths, shared their concerns. Acting on his own initiative, he introduced a Lands Ordinance in 1925 to confine mining to a depth of 20 feet. The reasons for introducing this are explained in a Memorandum to the then Australian Prime Minister (Memorandum to Prime Minister, 25 March 1926, Australian Archives CRS A518, D 112/6/1; Nauru Memorial, Annexes, Vol. 4, Ann. 50).

> "He [Griffiths] said that it was the natives themselves whom most strongly desired that mining should not exceed this depth. They were firmly convinced that if this depth were exceeded it would be impossible to plant any food-producing trees in the future. It was therefore the representations of the natives that were responsible for the ordinance.
>
> He considered that the restriction of mining to a depth of twenty feet was really necessary so that food-bearing lands might be assured for future generations. The Nauruan population was a rapidly increasing one, and the natives and himself were obliged to think of the future. The interests of the natives were the first consideration: the phosphate industry was a secondary consideration."

Australia did not accept his reason. Under the 1923 Amendment to the Nauru Island Agreement it had power to disallow the Ordinance. It did so and the Ordinance never entered into force. In its place (and after Griffiths's replacement) was introduced the 1927 Lands Ordinance Amendment Ordinance, an Ordinance which acquired for the Administration complete control over phosphate and non-phosphate bearing land. That Ordinance in effect dispossessed the Nauruans and left mining unlimited in scope and depth. The sad tale of this Ordinance is told at length in the Nauru Memorial (Vol. 1, pp. 194-202, paras. 523-539).

The terms of that Ordinance remained in force to control Nauru land-holding up to the time of Independence.

Even before the era of scrutiny by the United Nations Visiting Missions, mining on Nauru had exercised the minds of the Permanent Mandates Commission. The first time it had a chance to consider Nauru, the Commission reported

> "This tiny island which is hidden in the vast extent of the Pacific, has only about 2,000 inhabitants. Its sole wealth — and it is considerable — consists in vast and rich deposits of phosphates. The Mandate for this island was conferred by the Principal Allied and Associated Powers upon the British Empire, which delegated the working of this mineral wealth to Australia, Great Britain and New Zealand. These three Governments have devolved upon Australia the responsibility for the administration for a first period of five years. From information supplied by the Mandatory Power, the Commission finds ground for fear that the fundamental principle of the institution of Mandates may, as regards its application to this island, be prejudiced in two ways. It fears on the one hand that the material wealth of this island and the small number of its inhabitants may induce the mandatory Powers to subordinate the interests of the people to the exploitation of the wealth. It is, therefore, not without deep concern that it considers the question whether the wellbeing and development of the inhabitants of this island, which, in the words of the Covenant 'form a sacred trust of civilisation', the accomplishment of which it is the Commission's duty to safeguard, are not in danger of being compromised. It is moreover, concerned with the consideration of the question whether the mandatory Power, by reserving the ownership and exclusive exploitation of the resources of this territory to itself, has brought its policy into true harmony with the requirements of the Mandate which, in accordance with the Covenant, it should exercise on behalf of the whole League of Nations." (League of Nations, Permanent Mandates Commission, *Minutes*, 2nd Session, 11th Meeting, 1922, p. 55.)

M. Rappard, the distinguished Secretary to the Permanent Mandates Commission, had commented in 1923 that the Mandate was a system of tutelage and that this implied a disinterested activity. Sir Frederick Lugard, a distinguished member, commented that if the principle of disinterestedness were abandoned, there would in reality exist a disguised form of annexation (League of Nations, Permanent Mandates Commission, *Minutes*, 3rd Session, 1923, p. 56). (This comment, indeed, was entirely valid, particularly in view of the historical attitude of Australia towards Nauru. Australia would have much preferred to annex Nauru, but for the introduction of the Mandate system.)

After consideration, the Commission, that is the Permanent Mandates Commission, adopted the following declaration of principle:

> "It would be contrary to the spirit of disinterestedness which is the characteristic of the system of mandates for a mandatory State to create, under cover of its mandate, in the territory entrusted to it for administration, a Government enterprise of an industrial or commercial character, the profits of which were credited to the central budget of the Mandatory State." (League of Nations, Permanent Mandates Commission, *Minutes*, 3rd Session, 1923, p. 57; Nauru Memorial, Vol. 4, Ann. 24.)

Having made its stand on principle, the Permanent Mandates Commission was concerned thereafter to consider the actual effects of the mining on the indigenous inhabitants. But for this information, the Permanent Mandates Commission was completely dependent upon the Annual Reports of the Australian Administration.

However, in 1939, at a time when phosphate exports had shot up from a half million tons a year to nearly a million (70 per cent of which went to Australia) there was an interesting exchange between the Permanent Mandates Commission and Mr. J. R. Halligan, the Australian representative before the Commission. He was later actually to become Secretary of the Australian Department of Territories which administered Nauru, and then, still later, the Australian Commissioner of the British Phosphate Commissioners. A number of questions were asked him.

> "Mlle Dannevig asked whether there was sufficient room left on the island for native population.
>
> Mr. Halligan pointed out that Nauru was an island with a circumference of some twelve miles. The outer rim was formed by a coral reef which was exposed at low tide. Then came a beach and a strip of fertile land some 200 to 800 yards wide running up to a plateau in the centre of which the phosphates were deposited. The natives lived on the fertile strip where they had sufficient accommodation and were able to grow their crops of coconuts and pandanus palm.
>
> M. van Asbeck recalled the question asked by the Chairman at the thirty-fourth session as to whether worked-out land was permanently unsuited for cultivation of any kind. Was any more recent information available on that point?
>
> Mr. Halligan referred to the photographs contained in the annual report for 1926, which showed that the removal of phosphate deposits left pinnacles of coral exposed which were obviously unsuitable for cultivation.
>
> Count De Penha Garcia asked whether the Administration had made any calculation of the probable duration of the phosphate deposits.
>
> Mr. Halligan replied that several rough estimates had been made of the probable life of the phosphate fields. Much would depend on the depth of the deposits and the rapidity of working. At the present rate of output, it would be calculated that the deposits would probably last up to eighty or even to a hundred years." (League of Nations, Permanent Mandates Commission, *Minutes*, 36th Session, 8-29 June 1939, pp. 166, 169-170.)

At a crucial point of the island's mining history, when production had doubled and the results of earlier mining were there for all to see, the answers exhibited no sense of urgency, no real concern, no apparent knowledge of the destructive force that was being unleashed on the Mandate.

Mr. President, Members of the Court, it is useful to dwell for a short moment on how, towards the end of the Mandate, Australia found itself in the position of complete control over the small island and its rich phosphate reserves. Control over the island was exercised by Australia through the 1919 Nauru Island Agreement. Under that Agreement, all expenses of the Australian Administration, whether of a salary or welfare nature, were to be paid through the receipts of the BPC arising from the sale of phosphatic rock. It is useful to note that whenever extraordinary expenditure was required by the Administration, this was mounted through the BPC and was taken out of the receipts of phosphate. Take, for example, the situation at the end of the Second World War, when all Nauruan housing had been reduced to rubble following incessant bombing. Reconstruction was carried out by the Administration through an advance of

£200,000 from the BPC (Viviani, *Nauru*, p. 90). This was, in turn, repaid by the Administration by a specific "Royalty" of 6d. a ton for every ton of phosphate exported.

In order for the BPC to gain access to the phosphate, the Australian Administration enacted a Lands Ordinance in 1921 and with an important Amendment in 1927. As indicated already, the effect of the 1927 Lands Ordinance Amendment effectively left no bargaining power in the Nauruans, the owners of the land. As the Nauruan Memorial demonstrates (Nauru Memorial, Vol. 1, Part 1, Chap. 3), it constituted a form of expropriation as there was nothing of value for the BPC to hand back. It constituted a systematic destruction of land without redress. And that system remained in force until independence in 1968.

The Second World War was an horrific hiatus. Nauru homes were bombed out of existence and the Nauruan population was reduced by one-third.

Following that war, Australia administered the island under a Trusteeship Agreement of 1947, acting on behalf of the three Governments. In fact, Australia had made attempts to become the sole Administering Authority but without success (Macdonald, *In Pursuit of the Sacred Trust*, p. 22). Australia had believed it earned that right as it had, after all, been constantly the Administration.

In describing the fact that there were consultations between the three Governments before nominating an Administrator in the Mandate period, the Australian Counsel, Professor Pellet, refers to Dr. Barrie Macdonald as having said that consultations were always held between the three Governments prior to the appointment of an Administrator (CR 91/16, 12 November 1991, p. 59). But in simply selectively mentioning that fact, he fails to illustrate the essentially passive nature of the other Partners. And, it is useful for that reason to quote the reference in full:

> "Although New Zealand and the United Kingdom had been consulted about the appointment of each Administrator, and their representatives had attended all relevant discussions at the Permanent Mandates Commission, neither had played any significant role. True, from time to time, they had admonished Australia — as over changes to labour regulations and restrictions on mining practice — but this was usually at the behest of the BPC and did not reflect any close interest in the island. But the tripartite arrangement was an insurance policy; quiescence meant no more than a general satisfaction with the conduct of the phosphate industry." (Barrie Macdonald, *In Pursuit of the Sacred Trust*, p. 21.)

B. Post-War — Resettlement

I turn now to the resettlement issue.

Nauruans, anxious about rehabilitation were told, particularly by the BPC, that rehabilitation was an impractical exercise. Such information was given to each Visiting Mission. And the first Mission in 1951 stated that the phosphate land once worked is completely wasteland and impossible to reclaim (United Nations Visiting Mission — Nauru 1951, Trusteeship Council, *Official Records*, Suppl. No. 3 (T/898), para. 50). At this early point, only a couple of years into resumed mining after the war, the Mission stated that resettlement may provide the only satisfactory long-term solution. In this regard, the Mission had noted the Banabans as a case in point.

Banaba — also known as Ocean Island — was the twin phosphate island to Nauru in the Central Pacific. It was part of the then British colony of the

Gilbert and Ellice Islands. The British Government, at the behest of the BPC, resettled the population, somewhat smaller than that of Nauru, on the island of Rabi in the then colony of Fiji (United Nations Visiting Mission — Nauru 1951, Trusteeship Council, *Official Records*, Suppl. No. 3 (T/898), para. 38). The Nauruans were well aware of the circumstances of this move and its difficulties. And that story was played out in the Chancery Division of the High Court in England in the *Tito and Others* v. *Waddell and Others* case (No. 2) [1977], 3 All England Reports 129. By contrast, the Nauruans felt protected because of the strength of the Trust. But they were anxious and remained so throughout discussions of resettlement — to them the maintenance of their community and identity was paramount. To them, the Trust eventually would offer them self-determination — though that was not necessarily the view of Australia.

The "Rabi" solution was attractive to the BPC, though the Secretary of the Australian Department of Territories at that time (1953) considered that the BPC may well have been pushing the thought simply to get Nauruans out of the way (Nauru Memorial, Vol. 4, Ann. 60).

In the meantime, the Australian Government organization, the Commonwealth Scientific and Industrial Research Organisation (CSIRO) carried out an inquiry in 1953 as to whether land on Nauru was suitable for agricultural purposes. It found that regeneration for agricultural purposes was a practical impossibility (Preliminary Objections of Australia, Vol. II, Ann. 14). The report, whilst denying the possibility of agriculture for the worked-out phosphate lands, stated that "it is possible that some better use can be made of these lands than at present". In the result, the phrase "no practical possibility" was used thereafter whenever the question of rehabilitation was raised. One of the authors of the Report, Dr. Phillis, did say again in 1960, without further investigating, that regeneration of the worked-out phosphate land was not possible. He was content with his earlier 1953 survey results. These were the only inquiries into rehabilitation as such, before the Davey Report. Some estimates of soil importation had been made by the BPC in 1964 (Preliminary Objections of Australia, Vol. I, p. 36).

This report of the CSIRO boosted the BPC preference for resettlement. The only other alternative put forward was to proceed with an assimilation proposal, as Nauruans had been educated "in the European manner" (Nauru Memorial, Vol. 4, Ann. 62). This was a scheme transmitted to the Nauruans by letter from the Australian Minister for Territories on 12 October 1960 (Preliminary Objections of Australia, Vol. II, Ann. 4) of supported individual emigration to the countries of the Partner Governments, but it was never attractive to the Nauruans for the obvious reason that it meant assimilation and loss of community.

Soon thereafter, a Director of Nauruan Resettlement, Mr. W. R. Marsh, of the Australian Department of Territories was appointed in 1962 by the Australian Minister for Territories, Mr. Hasluck. The Nauruans, a little bemused by these attempts to move them on but extremely worried by the increased level of mining and the resultant devastation, were gracious enough to say they would consider whatever serious proposals were placed before them. The early 1960s then were, for the want of a better term, the resettlement days. Mr. Marsh assiduously combed the South Pacific looking for spare islands offering a fair prospect. In the end it came down to two — just off the Australian coast, Curtis Island and Fraser Island. The Nauruans preferred Fraser Island but were told it was not available. So it was Curtis Island or not at all. Although the mosquitoes were bad and the people rather unfriendly, nevertheless the Nauru Local Government Council representatives promised they would put the case to the Nauruan Community. Mr. Marsh went to Nauru to present the proposal. It was rejected on the clear but simple ground that the offer of Curtis Island carried with it Australian citizenship and nothing other than local government controls in the State of Queensland. The Nauruans were not able to preserve their national identity.

This was no *volte-face* as suggested on behalf of the respondent State on 11 November (CR 91/15, p. 76). The Nauruans had never given their *imprimatur* to *any* resettlement. That could only come about if the specific requirements of the Nauruans and, in particular, their requirement for a continued national identity were fulfilled.

The evidence of Mr. Marsh before the Weeramantry Committee was useful and it is set out in the Nauru Memorial, Vol. 4, Ann. 73. Little attention has been given to the question of what resettlement would mean in the context of a Trusteeship Agreement. What would have been the situation of the Nauruans had most been moved to Curtis Island? It is entirely possible that the Nauruans could still have sought independence for Nauru and gained control of the phosphate industry. There would have been little chance of the BPC remaining in control of that industry. Mr. Marsh upon reflection considered that the Nauruans could have negotiated both resettlement, independence on Nauru and control of the industry — a view shared, I might add, by Ms. Brooks, a Liberian representative, and former Chairman of the Trusteeship Council and President of the General Assembly (Weeramantry Report, pp. 869-883).

To carry through resettlement, as Mr. Marsh told the Weeramantry Inquiry with all the required infrastructure was likely to take anything up to seven years. But the decision was made by 1964 that the Nauruans would reject Curtis Island and resettlement and stay on the island. Therefore one moves from resettlement with its associated plans to rehabilitation and its associated plans. With the decision now made clearly to remain, rehabilitation became paramount. And, of course, the Nauruan point was logical. If you are so keen to finance our resettlement elsewhere, then there is no reason why you should not finance the rehabilitation when we stay on Nauru.

C. *Post-War — Rehabilitation*

The Nauruans now pressed for a reconsideration of the conventional thinking of the BPC and Australia on restoration of worked-out lands that it was all impractical. Nobody had thought very cogently on the question, the Australians because they did not want to do it anyway, and the Nauruans perhaps a little simplistically without proper advice, were thinking of an imported soil technique, which was both costly and possibly dangerous from a soil quarantine point of view.

The estimates of cost relating to imported soil provided by BPC in 1964 and the letter of CSIRO in January 1965 were predictably less than encouraging (Preliminary Objections of Australia, Vol. II, Anns. 18, 19, 20). Meanwhile, at the United Nations, moves had been made to reassess the situation in the light of the Nauruan decision to remain on the island. The General Assembly passed resolution 2122 (XX). And that resolution, Mr. President, absolutely makes it clear that, following the breakdown of any resettlement plans and any action consequent on that, rehabilitation of the worked-out phosphate lands assumed a new importance. And to reinforce the message, the Head Chief made clear to the next meeting of the Trusteeship Council, the 33rd Session, that the island would have to be completely rehabilitated and that such rehabilitation rested with the Administering Authority. The Head Chief added, however, that in the event that Nauru gained independence in 1968, Nauruans would therefore assume responsibility for land mined thereafter. He further indicated that the proportion based on presently mined as to future mined land was one-third to the Administering Authority and two-thirds to the Nauruan people. Significantly, he added that in order to be able to discharge their responsibility for two-thirds of the rehabilitation project, the Nauruans would require all the benefits that could be derived from the island's only natural asset — phosphates (Trusteeship Council, *Official Records*, 33rd Session (July 1966, T/SR 1285, p. 91). In saying that, the Head Chief well understood that to achieve independence Nauru would have to demonstrate some economic viability. And it could not do that unless it controlled the phosphate industry and continued to mine. He also knew that Australia would push, with its heavy dependence on phosphate, for a security of supply at an agreed price.

It is important, however, Mr. President, Members of the Court, to realize the consistency of the Nauruan position. It did not change thereafter one iota from that revealed by the Head Chief at the 33rd Session of the Trusteeship Council. One could properly say that resolution 2111 (XX) and the guidelines set by the Head Chief in the Trusteeship Council in the 33rd Session were the firm base for all later argument on rehabilitation.

Meanwhile something had to be done about rehabilitation. And to this time, the only extant documents were the 1954 CSIRO limited report with the addenda letters and some BPC costings. Already in 1965, the Nauru Local Government Council had signalled to the Australian Government that the Administering Authority should assume responsibility for restoration of the mined areas, at no cost to the Nauruans. The Australian Minister for Territories appointed, in late 1965, a Committee on rehabilitation. The Committee was made up of a consulting engineer, Mr. Davey, as Chairman, Professor Lewis, a Professor of Agricultural Economics, and Mr. Van Beers, a Soils Officer of the Food and Agriculture Organization. The terms of reference were more wide-ranging than that of the CSIRO inquiry in 1954 (Nauru Memorial, Vol. 3, Ann. 3). Now although the Committee spent only ten days on the island, the Report released in the latter half of 1966, was as thorough as it could be, given the constraints of time under which it worked. In fact, the Weeramantry Report in considering the Davey Committee Report gave as its assessment the view that, given the time frame which did not allow for test work and the reliance that one had to place on information gained from BPC engineers on the island and in Australia, many of the observations and recommendations were as valid now as they were in 1965 (Weeramantry Report, p. 1132).

What the Davey Committee did *not* do was to suggest that restoration work could not be carried out or was impracticable. It is a travesty of the truth to quote simply the first conclusion of the Davey Committee Report, as the Australian Preliminary Objections do (Preliminary Objections of Australia, Vol. I, para. 81), or to state, as Australia has done before this Court, that the Davey Committee Report was pessimistic as to the practicality of rehabilitation on a large scale (CR 91/15, p. 77).

For the first time, Mr. President, here was a Report which said that work could be carried out, would be practicable, but would cost money (though not an impossible amount having regard to the value of the phosphate mined).

The Davey Committee agreed, as all authorities before and after have done (including the Weeramantry Report), that simply backfilling the mined areas from external sources was not a practical or even a wise course. What the Committee did say, however, was that land could be adapted attractively for habitation, that a large construction project of airstrip and water storage should be set-up, that some areas should be revegetated and that a system of land use planning was desirable. And this was costed out in Section Ten of the Report at 31 million dollars Australian at that time.

It is true that a statement by the Head Chief (Nauru Memorial, Vol. 3, Ann. 4, p. 265) criticized the Report, basically because it did not go far enough and offer total restoration. "Our people", he said, "have been seeking restoration of the mined areas as a *right* to have returned to us adequate land for a permanent home". But he went on,

> "We were interested in resettlement only because it appeared to be an easier way of solving our problem, and the Administering Authority encouraged this by suggesting that it would be impossible to live on Nauru and, that even if we could, it would still not be in our best interests to do so . . . To the Nauruans the most pleasing aspect of this report is that the Committee has confirmed our view that it *is* practicable for us to stay on Nauru. We have lived on this island for centuries, and when no other solution could be found we were sure if the mined lands were restored it would be possible for us to remain on Nauru even though our views were not accepted by the Administration."

In that sense, the Report was a watershed.

Mr. President, I would like to jump ahead a moment to the end of 1968.

Australia takes a less than candid stance when discussing Nauru President Mr. DeRoburt's letter of 1968, written to the Australian Minister of External Affairs soon after independence (Nauru Memorial, Vol. 4, Ann. 76). The Australian discussion of this before this Court on Tuesday (CR 91/16, p. 26) uses a selective part of the letter and asks the rhetorical question, what can one make of this? Australia says "The Court will note that this is not the previous rehabilitation claim." But the first two paragraphs of the letter addressed to the Australian Minister of External Affairs, and which were not quoted, relate directly to the Davey Committee Report of 1966, and the question of rehabilitation, and I quote the paragraphs:

> "As you may be aware, the Committee of Experts appointed by the Partner Governments and the Council of Nauru in 1966, to examine the possibility of rehabilitating the mined-out phosphate lands on Nauru, advocated in their Report the building of an airstrip to international specifications as a possible and useful way of rehabilitating such lands.
>
> Due to differences in principles of approach to the question of rehabilitation as a whole, the Committee's Report was not adopted although, in the discussions of it at working party level, representatives of the Partner Governments as well as the Nauru Delegation saw merits in the suggestion. The Nauru Delegation, led by myself, had declined then to pursue the proposal to its conclusion as to have done so would be taking the matter out of its proper context of rehabilitation, which question we had always wanted to be treated integrally. The Nauru Delegation, however, did point out to the representatives of the Partner Governments at the talks that it reserved the right to take up the suggestion for an airstrip in future with the Governments concerned."

Indeed, Mr. President, what do we make of this? It is and was part of the rehabilitation programme. It is put forward in the light of the Davey Committee proposal for a major construction, including an airstrip. It was raised in the December following independence.

It was a clear attempt by the President of Nauru to bring forward the discussions on rehabilitation, which he had envisaged as an attempted settlement of the rehabilitation issue arising out of his specific statement to the Trusteeship Council about which we have heard so much. Australia says there was in this letter no allegation of breach or of any legal responsibility. But it is clear from the reply of the Minister (Nauru Memorial, Vol. 4, Ann. 77) that it was so seen by Australia. Why otherwise would the Australian Minister deny responsibility for rehabilitation of mined-out phosphate lands, and then parade the formula — "The Partner Governments remain convinced that the terms of settlement with Your Excellency's Government were sufficiently generous to enable it to meet its needs for rehabilitation and development."

D. Rehabilitation and the Nauru Talks

Mr. President, I move now to the question of rehabilitation as it was faced in the Nauru Talks.

The Nauru Talks involved discussions between representatives of the Nauru Local Government Council and Australia, with largely silent participation at various stages by the other Governments. The Talks were conducted between 1964 and 1967 (these Talks are all consolidated within Volume 3 of the Nauru Memorial). They dealt with three principal areas of concern: political independence, the future of the phosphate industry, and the rehabilitation of the worked-out phosphate lands. In reality, political independence created some problems in the mind of Australia relating to the nature of small States, particularly in the Pacific region. And the second question, the future of the phosphate industry, was to become in the end a matter of bargain. Australia wished, so far as possible, to resist losing ultimate control of this resource, so vital for its own rural interests. It was facing, however, an uphill struggle against the persistence of the Nauruans and the difficulties created by the Committee of Twenty-Four. Australia eventually had to be content with a regime which gave it security, priority, even exclusivity of supply at an assured price. It managed also to convince the Nauruans to pay for an island full of fast depreciating machinery and buildings even though, of course, that had already been originally paid for out of the proceeds of phosphate.

However, the sticking point was the third area. It was a sticking point because to undertake rehabilitation would cost money. That had been demonstrated quite convincingly when the Davey Committee came up with a figure of $31 million. One must remember, Mr. President, that Australia was here facing something very unusual. Since the days of Prime Minister William Morris Hughes and the attempted annexation of Nauru after the First World War by Australia, that country under the terms of the Nauru Island Agreement had never had to contribute a cent either to the upkeep or the development of Nauru. Everything was paid for out of the proceeds of phosphate, including the salary of the Australian Administrator (Nauru Island Agreement, Art. 12). As a result, Australia consistently denied any responsibility for the rehabilitation of worked-out mined lands. But its consistency in denial was never argued on the grounds that it had no obligation under the Trust. Nor does Australia seem to deny such an obligation. During the Talks it was put on the basis of not being consistent with mining practice or supposed impracticality. It need not be reiterated here that the sheer destructiveness of the extraction, the demolition of the island home of the Nauruans before their very eyes, made comparisons with other mining projects highly problematic. Moreover they were being assured by the Administration that there was no redress.

It was during one of these series of Talks between Nauru and Australia that an interesting exchange took place between the Head Chief and the Chairman of the Meeting, Mr. Warwick Smith. Nauru had only recently been offered Curtis Island and had noticed there mineral sand mining being undertaken.

The Head Chief said:

> "Since the Governments were prepared to restore the area of Curtis Island affected by mining for mineral sands why were they not prepared to undertake similar responsibilities on Nauru.
>
> The Chairman said that it was standard practice to rehabilitate mineral sands but not open cut mining or phosphate. He had mentioned these matters merely to indicate that the Governments' view was that rehabilitation was likely to be impracticable and ineffective in the long term. The Governments were however quite willing to see the proposed investigation committee set up to look into the question to help to get a common view, although this in no way committed them to meeting any costs for rehabilitating the island." (Record of Negotiations, 31st May-10th June, 2nd June p.m. 1965, internal pp. 6-7; Nauru Memorial, Vol. 3, Ann. 2, pp. 41-42.)

The reference there, Mr. President, to the "proposed investigation committee" was to the Davey Committee about to be established.

The sequel in this exchange was even more extraordinary. When the Davey Committee did investigate, it gave its considered opinion of the position existing in Nauru:

> "There has developed, therefore, a climate of opinion in which the need for controls to obviate destruction and pollution of the natural environment is accepted, and restorative treatment of affected land is the responsibility of the extractive industry. It is not the Committee's responsibility to recommend who should bear the cost of any treatment of worked-out phosphate lands undertaken on Nauru, but it would seem consistent with the general trend in regulatory policies for extractive industries to require such treatment to be a responsibility of the phosphate-extractive industry."
>
> "Conditions vary and there are some very special circumstances affecting the Nauruan case, notably the limited land and other resources of the Island and the fact that mining operations will lay bare two-thirds of the total land area. Moreover agricultural use is not the only possible objective for land restoration, and even if uneconomic for this purpose, there are many possible alternative methods of treatment.
>
> Informed decision-making about the treatment of areas stripped of phosphate calls for consideration of the full range of alternative treatments. The end-use desired and the costs involved largely determine the choice of alternatives. For some purposes, such as water catchment and storage, airport and road construction, a soil cover will not be necessary. For other purposes, such as public buildings, residential and recreational areas, only a modicum of soil cover is needed. For agricultural production, rehabilitation would require a deeper covering of soil to be placed on treated areas (together with, for many types of crops, the provision of supplementary irrigation water). For greater environmental congeniality much could be achieved by revegetation of worked-out areas, without or with a minimum of resoiling treatment." (Nauru Memorial, Vol. 3, Ann. 3, pp. 236-237.)

The very Committee set up by Australia had substantially undermined the Australian position on mining practice and impracticality. In its Statement of Rehabilitation, the Nauruan Delegation immediately took this point up:

> "There is ample precedent for requiring extractive industries to restore mined land, especially where open cut methods are used. Thus, in Australia, companies mining beach sands are required to restore the land surface to its original condition, and it was planned to impose such requirements upon companies mining rutile sands on Curtis Island. Some regard for this principle has also been acknowledged on Ocean Island but not on Nauru. The question of open-cut mining has been subject to recent investigation in the United States and increasing legislative action is being taken to require restoration of land surfaces.
>
> In this connection we agree fully with the conclusion reached by the Committee of Experts appointed to investigate the rehabilitation of mined lands on Nauru that 'it would seem consistent with the general trend in regulatory policies for extractive industries to require such treatment (rehabilitation) to be a responsibility of the phosphate-extractive industry'." (Nauru Talks 1967, 69/2, internal p. 140, Nauru Memorial, Vol. 3, Ann. 5, pp. 555-556.)

The rehabilitation issue was very much on the table. But there was no settlement of that issue.

Not long after, the Nauru Local Government Council had negotiated Heads of Agreement which were signed in Canberra on 15 June 1967, and which were perfected into a formal agreement, entitled an Agreement relating to the Nauru Island Phosphate Industry. Though the Agreement was finally signed in November, it took effect retrospectively on 1 July 1967. That Agreement dealt specifically with the future of the Phosphate Industry, and by clauses 5 and 6 provided arrangements which Australia was seeking on supply and price. What it did not do was make provision for rehabilitation of phosphate lands.

Australia had asserted at the Talks that:

> "Financial arrangements could be such as to permit the Nauruans to do what they wished, within reasonable limits, in the way of rehabilitation. As part of the total arrangement the Joint Delegation would like to see the Nauruans withdraw their claims in respect of rehabilitation." (Nauru Talks 1967, internal p. 56, Nauru Memorial, Vol. 3, Ann. 5, p. 471.)

This was answered by Nauru in the following way:

> "As the Island was to be a permanent home for the Nauruan people, rehabilitation is needed. The Nauruans could not talk about details under a cloud of denial of broad principles. The land must be rehabilitated. Once agreement on broad principles was reached technical details could be discussed . . . if the Governments claim that their proposals [should] be fully adequate for the present and future needs of the Nauruans, then we feel that it is up to *you* to try to convince us on this point by giving whatever details you feel appropriate" (*ibid.*, internal p. 82 (*emphasis in original*), Nauru Memorial, Vol. 3, Ann. 5, p. 497),

and again I quote:

> "We are not prepared publicly or privately to accept the Partner Governments' view that the proposed financial arrangements are adequate to cover our future needs including rehabilitation or resettlement." (*Ibid.*, internal p. 112, Nauru Memorial, Vol. 3, Ann. 5, p. 527.)

In essence, in gaining independence and control over the phosphate industry, Nauru was receiving nothing more than it was entitled to. It had, of course, agreed to pay at independence $21 million for the depreciated assets of the BPC on the island.

Therefore, upon independence, whatever it might have received in the first year, which was boosted by some back royalty payments, it had to face up to a substantial payment out as a condition of gaining control over the industry. The payment of the purchase money for the Nauru assets was a *sine qua non* towards gaining management of the industry (Nauru Memorial, Vol. 3, Ann. 6, Agreement relating to the Nauru Island Phosphate Industry, Clauses 11 and 13).

One of the proposals put by the Joint Delegation to the Nauruans when drafting the Heads of Agreement was a clause in these terms:

> "*Rehabilitation*
>
> 9. The Partner Governments consider that the proposed financial arrangements on phosphate cover the future needs of the Nauruan Community, including rehabilitation or resettlement." (Nauru Talks 1967, internal p. 160, Nauru Memorial, Vol. 3, Ann. 5, p. 575.)

The proposed Clause was not proceeded with because the Nauruans refused to accept it. That was the last seen of it.

Already in the Talks, the Australian Chairman, Mr. Warwick Smith, had sought to place on the Nauruans responsibility for rehabilitation. He stated that "on rehabilitation you [the Nauruans] have accepted the responsibility for it provided that all the proceeds from the phosphate are available to the Nauruan people". Nauru answered this in the following terms:

> "Before going any further, the Nauruan delegation would like to correct what appears to be a misconception of the Partner Governments about our attitude to rehabilitation of the mined areas on Nauru. A few days ago (on 14th April), the Chairman re-stated the Governments' position that, in your view, the financial arrangements would be 'sufficiently liberal to take care of the Nauruan requirements, including rehabilitation or resettlement'. We do not agree with your attitude on this matter (for reasons we shall give later) but at least we understand what you are saying.
>
> However, the Chairman then said 'on rehabilitation, you [the Nauruans] have accepted the responsibility for it provided that all the proceeds from the phosphate are available to the Nauruan people'. This is *not* a correct statement of what we have been saying. It is correct only regarding areas mined *in future*. The Nauruan delegation has argued from the beginning that the responsibility for restoring the land already mined (about one third of the island) rests with the Partner Governments who cannot divest themselves of this responsibility merely by saying that they will not accept it." (Nauru Talks 1967, internal p. 140, Nauru Memorial, Vol. 3, Ann. 5, p. 555.)

And again:

> "We value the freedom that we can attain on Nauru sufficiently to face the cost of rehabilitating lands that we mine in the future, but we are well aware that our basic opportunities to survive as an independent people are being severely curtailed by such large expenditures on rehabilitation and we need every penny that we can get. We are not prepared publicly or privately to accept the Partner Governments' view that the proposed financial arrangement are adequate to cover our future needs including rehabilitation or resettlement." (Nauru Talks 1967, internal p. 112, Nauru Memorial, Vol. 3, Ann. 5, p. 527.)

Nothing could have been clearer.

F. Rehabilitation with the United Nations — 1967

There was no change in the United Nations to the attitude and arguments advanced by the Nauruans during the course of the Nauru Talks 1964-1967. In fact, the discussion of the issue in the United Nations provides support, both for the continuity of the dispute over rehabilitation and for the proposition that there was a clear distinction between political independence, control over the phosphate industry and the question of rehabilitation.

The Report of the Trusteeship Council for the year ending June 1967 reveals that the Head Chief regarded the question of rehabilitation as the most irreconcilable issue with the Administering Authority. He stated that the Nauru Local Government Council considered that the Administering Authority should accept responsibility for rehabilitation of land already mined, but that the Local Government Council would be responsible for all lands mined after 1 July 1967, that is, the effective date of the Phosphate Industry Agreement, which would give Nauru the net proceeds of the sale of phosphates (General Assembly, *Official Records*; Preliminary Objections of Australia, Vol. II, Ann. 28, para. 386).

At the same meeting, the representative of France congratulated the Parties that full ownership of the phosphate deposits was granted to the Nauruan people, but regretted that no agreement had been reached between the Administrative Authority and the Nauruan people on the rehabilitation of the worked-out mined lands (*ibid.*, paras. 412-413). The French representative showed a clear appreciation that rehabilitation was a distinct issue — that point was also clearly accepted by the Liberian representative, who asked that before independence the Administrative Authority commence undertaking the restoration of the island (*ibid.*, para. 410). The Liberian representative already had said, in the previous year's Trusteeship Council Report, that the question of ownership and that of restoration was not contingent one upon the other (Nauru Memorial, Vol. 1, para. 605).

In its Report for the year ending June 1967, the Trusteeship Council regretted that differences continued to exist on the question of rehabilitation, and expressed earnest hope that it will be possible to find a solution to the satisfaction of both Parties (Preliminary Objections of Australia, Vol. II, Ann. 28, para. 403).

Then at the Thirteenth Special Session of the Trusteeship Council, the Head Chief on 22 November 1967 made his statement that the three Governments should bear responsibility for rehabilitation for land mined prior to 1 July 1967, but that was not an issue relevant to the termination of the Trusteeship Agreement currently before the Trusteeship Council. The Nauru Government, he added, would continue to seek a just settlement of their claim (Preliminary Objections of Australia, Vol. II, Ann. 29, para. 20). It is Nauru's submission that the Head Chief was entirely correct in saying that it was not an issue pertinent to termination. He also made it clear that rehabilitation represented a justifiable claim by Nauru. No one, not even Australia, at that Trusteeship Council meeting expressed any dissent or even doubt with this statement. It is not unfair to say that, looking at the history of the problem within the Trusteeship Council, the various representatives had taken a similar view to that of the French representative, that it was a distinct issue and certainly not tied either to termination or ownership of the industry.

The Head Chief did not repeat that statement in the Fourth Committee just less than a fortnight later. His own statement explains that convincingly. Yet in the Fourth Committee the Indian representative noted the considerable difference of opinion between the Nauruans and the Administering Authority, and he shared the hope that a just agreement would be reached in conformity with General Assembly resolution 2226 (XXI) (Preliminary Objections of Australia, Vol. II, Ann. 30, p. 266). Here again, there was not an attempt made by Australia or anyone else to refute this position. No statement or explanation was given that the Nauru position now some years old had changed. No one noted any change. And, of course, for good reason, for there had been no change. The United Nations evidently assumed that Australia would, in all good faith, be prepared to hold talks with Nauru on rehabilitation upon independence and it felt no need specifically to stipulate this as a condition for "unqualified" independence.

F. Post-Independence Acts

On Independence Day 31 January 1968, with all former Governments represented and including a representative of the Secretary-General of the United Nations, the Head Chief, now as President, stated that he held it against the Governments of Australia, New Zealand and Britain to recognize that it was their responsibility to rehabilitate one-third of the island (Nauru Memorial, Vol. 1, para. 615). Before representatives of the Australian and the world press, he stated that Nauru held the former Partner Governments responsible in meeting the cost of rehabilitation of the mined-out areas, namely one-third of the island (Nauru Memorial, Vol. 4, Ann. 69). This was not the act of a person who had supposedly only a month or two earlier waived any claim in the Fourth Committee. And certainly there was not a hint or suggestion by anyone from whatever side either of surprise or that there had been a previous waiver. It was, after all, about as strong a gathering as possible in which to assert the continuity of the claim and, of course, on the very first available occasion.

Amongst a people as democratic as the Nauruans, where there are no organized parties and within a Parliament made up simply of independent members, it is not always easy to obtain a consensus. However, on one matter there is always expressed a national consensus — and that is the Nauruan assertion of the clear responsibility of the former Administering Authority to carry out rehabilitation of land mined prior to independence at the cost of the Administering Authority. Two simple examples of this may be shown.

First, in drafting the fundamental law of the State, the Constitution, there was inserted by the Nauruan Constitutional Convention, which sat just before independence and a few months after, a provision, Article 83, Clause 2, which reads:

> "Nothing in this Constitution makes the Government of Nauru responsible for the rehabilitation of land from which phosphate was mined before the First day of July One thousand nine hundred and sixty-seven." (Nauru Memorial, Vol. 4, Ann. 42.)

This was to make clear to future governments of Nauru that moneys were not to be expended on rehabilitation of lands worked-out in the past which is properly the responsibility of Australia, and of the other Partner Governments.

Secondly, in that first Parliament a resolution was passed, moved by the Honourable Kenas Aroi (who became President for a while in 1989, during the pendency of this case before the Court), calling for the prosecution of Nauru's rehabilitation claim with Australia and the other Partner Governments.

There was also established at independence a Rehabilitation Fund. It is true that it was established five days before independence by an Australian Ordinance. But, this and other funds, which will be discussed in more detail later, were set up at the behest of the Nauruans so that upon independence there would be a system of funds into which a part of the royalties from phosphates would be placed. It is important to note, however, that the Rehabilitation Fund did not exist before 25 January 1968. It is a fund developed from nothing during the course of Nauru's independence existence. It now stands at A$278 million, but in the first few years after independence the Fund was clearly at a low level of capital accumulation.

The Fund is specific. The object of the Fund is simply and solely for moneys in the Fund to be expended on restoring or improving parts of the island of Nauru that have been affected by mining for phosphate since July 1967 (Nauru Written Statement, p. 15, also see Nauru Constitution, 6th Schedule).

So since taking control of the phosphate industry, Nauru has engaged in a new but vital conservation measure required for the rehabilitation process. When land is being cleared for mining after removal of vegetation there is exposed a thin layer of topsoil and contaminated phosphate. This is illustrated in Photograph 6 of Volume 2 of the Nauru Memorial. The preservation of this topsoil overburden is quite crucial for later use in the rehabilitation process particularly where topsoil will be required. Nauru has assiduously skimmed off this valuable overburden ever since 1968 and stock-piled it for the future. Under the Australian Administration, the BPC simply cleared the topsoil overburden to a depth of six to ten inches, transported it to the coastal treatment plant where it was blended with phosphate and sold (Weeramantry Report, Vol. 5, Chap. 33, p. 1029). The Weeramantry Report (p. 1030) estimated in 1988 that the stock-pile since 1968 now stood at over three-quarters of a million tonnes. And the Report stated:

> "This black topsoil is composed of a combination of friable granular phosphate and the humus developed over centuries from the plateau trees and other vegetation. It is fertile and forms a good seed bed."

That valuable stockpile continues to grow.

Over the first decade of independence, when Nauru was setting up its Public Service, perfecting its administrative procedures, developing and administering its funds, and performing all the requirements of a small but industrially active State, the rehabilitation issue was not lost sight of. Every opportunity was taken, even after the rebuff of the 1968 letter to the Australian Minister over the rehabilitation project, to seek a reappraisal of the Australian position. As the Head chief in his statement (Nauru Memorial, Vol. 1, p. 258) says, he raised the matter with the Austalian Prime Minister, the Honourable E. G. Whitlam, on a State Visit to Canberra, and then again when the Australian Acting Foreign Minister, Senator Willessee, visited Nauru in 1974. In each case, however, Australia remained, as before independence, quite intransigent.

By the early 1980s, the Rehabilitation Fund was growing but, at the same time, the mining life of phosphate on Nauru was beginning to come to an end. And it was clear that plans were needed, and a further attempt to obtain the material assistance of Australia in the rehabilitation process was required. Therefore, it was necessary to make a further approach, and a letter was sent by the President of Nauru to the then and present Prime Minister of Australia, the Honourable R. J. L. Hawke in 1983 (Nauru Memorial, Vol. 4, Ann. 78). This met with a similar response to the other approaches, when the reply was eventually sent to the President in March 1984 (*ibid.*, Ann. 79). There were, however, in the reply the following added words:

> "The former Partner Governments agreed at that time that it was a requirement of termination of the Trusteeship Agreement that they were

> entirely cleared of any onus or financial responsibility for the rehabilitation of Nauru."

This brought a new dimension to the proceeding for nowhere had such a conditional requirement previously been so expressed, and certainly not either to the Nauru Local Government Council or the relevant organs of the United Nations.

After much consideration, the Nauruan Cabinet, in 1986, determined to institute an independent enquiry to fulfil a dual purpose. First, it would test the question of responsibility and the "so-called" conditions prior to determination of Trusteeship, and, secondly, it would carry out a further but much more technical and sophisticated enquiry into the cost feasibility of rehabilitation. For this purpose, it chose Professor Weeramantry, as Chairman, and an Australian civil engineer, Mr. R. H. Challen, along with Mr. G. Degidoa, a senior Nauruan. The enquiry had the benefit of counsel assisting and a small research staff. It conducted sittings over a space of 15 months and the report in ten volumes was delivered to the Cabinet and Parliament of Nauru on 29 November 1988. Australia and the other Partner Governments in the Trust were invited to participate but they declined (Nauru Memorial, Vol. 4, Ann. 80, Nos. 1, 2, 3).

This enquiry, Mr. President, is mentioned not simply to illustrate a further step along the track but to show the immense measures to which Nauru was willing to go, as it were, to get it right. Of course, this was an expensive enquiry but it was important in the eyes of the Nauru Government that, as a very small nation, they not only should be in a position to hold real and positive information but also that, if action was necessary, every available step had been taken and followed.

Upon the tabling of the Report in December 1988, bound copies were sent to Australia and the other Partner Governments. (Nauru Memorial, Vol. 4, Ann. 80, Nos. 22, 23, 24.) Diplomatic Note No. 167/1988 to Australia, *inter alia*, stated the following:

> "In this connection, the Department of External Affairs specifically draws attention, *inter alia*, to the following principal conclusions of the Commission of Inquiry:
>
> (1) that the failure to restore the worked-out land to usable condition, or to compensate the Nauruans for the loss of use of their lands, was a violation of international law and the relevant agreements;
> (2) that there was no agreed or just settlement which exonerated the former Partner Governments from the responsibility to rehabilitate the lands;
> (3) that a cost-feasible plan of rehabilitation of all the worked-out lands on Nauru can be developed.
>
> . . . .
>
> In the meantime the Department of External Affairs notes that the conclusions in the Report, in particular those referred to in the preceding paragraph, support the view which the Department has consistently maintained as to the responsibility for rehabilitation of the lands mined before 1968.
>
> The Department of External Affairs wishes to record to the continued determination of the Government of Nauru to proceed to the rehabilitation of the worked-out lands, so as to secure the future of the Nauruan people. In that regard, the Department again calls upon the Australian Government to accept its responsibilities and to co-operate to this end. The Department stands ready to discuss the forms which such co-operation might take." (Nauru Memorial, Vol. 4, Ann. 80, No. 24, pp. 564-565.)

Australia replied (Nauru Memorial, Vol. 4, Ann. 80, No. 26) by simply recalling its statements made in an earlier Note to Nauru that it would not be bound by findings of the Commission of Inquiry and that the Australian Government regarded the comprehensive Phosphate Agreement concluded prior to independence as a just settlement that cleared the Partner Governments of the former British Phosphate Commissioners of any responsibility for the rehabilitation of Nauru (Nauru Memorial, Vol. 4, Ann. 80, No. 15). That in itself was an unusual way of expressing the matter, as though, whatever happened, it was the *alter ego*, the British Phosphate Commissioners, that were concerned. The Note simply concluded by reserving its position on the Report.

Nauru waited a further two months without any further action or news. The Government then finally took the step to begin proceedings against Australia in this Court. It announced the lodging of the Application on 19 May 1989 by Diplomatic Note No. 69/1989 dated 20 May 1989 (Nauru Memorial, Vol. 4, Ann. 80, No. 28). Notes were also sent advising New Zealand and the United Kingdom of the position, also on 20 May 1989 (Nauru Memorial, Vol. 4, Ann. 80, Nos. 29 and 30).

Two things stem from this history. The Nauruan people since before independence, extending back to some of the earliest days of mining, have expressed a concern at the systematic laying waste of their land, knowing well that there is but a small finite territory with an increasing population. The demand for rehabilitation has been consistently expressed, despite a period in the late 1950s and early 1960s when the Administration turned the attention of all to resettlement. Every move has been undertaken properly and upon consideration, though constantly faced by the intransigence of the former Administration of the Trust.

Given the importance of the issue, the Nauruans have been painstakingly diligent to allow Australia, in particular, every chance and avenue to explore solutions. There has been a complete absence from Australia of constructive suggestion to assist in the rehabilitation. Always Australia has insulated itself by its own formula of "generosity" and "adequate resources". These, of course, are issues of the merits.

Nauru therefore has had to mount a task of great proportions, with the scarcest resources imaginable in manpower and infrastructure, to attempt to cope with a problem that was not, initially, of its making. Nauru has been prepared to save hard in the Rehabilitation Fund, and to expand its knowledge and resources by enquiries and other means to achieve a just result. In doing this, Nauru is met with the almost fatuous comment that the claim is new or unexpected. One has to ask what more over a period of years could they possibly have done to move Australia into action.

No country given its size and resources could have spent more time persevering to achieve an amicable and just solution. In terms of what is at stake, and the sheer physical task of rehabilitation, the time element is slight. Nauru has exhibited throughout the utmost seriousness about the claim, without unnecessary rancour or delay.

THE PHOSPHATE FUNDS

Mr. President, I have I think about 15 minutes to go. I am wondering whether this might be the time which you would desire to break.

The **PRESIDENT**: Mr. Connell, we, at this side of the bench, are also getting rather anxious about time.

Mr. **CONNELL**: I can continue if you would require.

The **PRESIDENT**: No, it is not only a question of continuing. The estimate we were given of the length of your presentation was one hour and it has so far extended to nearly an hour and a half, and this has been true of every presentation so far on the Nauru side. I wonder if I could draw attention of counsel generally to Article 60 of the Rules of Court which says that the oral statements shall be directed to the issues that still divide the Parties and shall not go over the whole ground covered by the pleadings or merely repeat the facts and arguments these contain. Now, there has been quite a lot of repetition of material that is set out in the written pleadings very clearly and it would help the Court, I think, if counsel could merely give references to that material when they wish to use it, rather than reminding us again of the text which is in the written pleadings. You want another 15 minutes, Mr. Connell?

Mr. **CONNELL**: I would ask the Court's indulgence if I may; it could be less. It could be 10 minutes, perhaps, to deal with the question of the Funds.

The **PRESIDENT**: I think if you could go on and make it 10 minutes it would be helpful.

Mr. **CONNELL**: If the Court pleases. The second of my two matters, Mr. President, is the description of the various Funds, and some consideration of the Australian argument relating to the absence of good faith, a question already argued before you by the distinguished Agent on Friday (CR 91/18, 15 November 1991, pp. 50-57).

The Republic of Nauru is unusual, though not unique if one considers some of the smaller Middle Eastern States, in that the economy is based on but one major industry, phosphate. Phosphate rock was to be found on the plateau of Nauru which rises some 30 to 70 metres above sea-level.

In a sense, Nauru resembles in shape an upturned oval dinner plate, the currently residential area being on non-phosphate bearing land around, as it were, the rim of the plate. The costal rim varies in width between 150 and 300 metres.

There is, however, one area in Nauru on the plateau which is residential and that is around the lagoon area of Buada. The Buada residential district is surrounded by a massive sea of coral pinnacles (Nauru Memorial, Vol. 2, Photograph 8).

However, in one respect Nauru can justly be described as unique, for, at the conclusion of phosphate mining the usable territorial area of the country will be reduced by 80 per cent. And that extent can be readily seen if one looks at Photograph 1 in Volume 2 of the Nauru Memorial.

But once phosphate mining was commenced in earnest under the British Phosphate Commissioners, the Nauruan people quickly came to the realization that there had to be a finite time when the reserves of phosphate would be exhausted. Although estimates varied widely in the 1930's as to the time taken to exhaust the assets, the Nauruans could see that unless funds were conserved, assets would be dissipated and forever lost. Nauru, therefore, has a policy of funding phosphate proceeds into specific funds. These funds are now controlled by a Statutory Trust, the Nauru Phosphate Royalty Trust, which was set up at independence.

It is important to realize that each one of the funds, bar one, came into being at the request of the Nauruans. They were not instigated or prompted from the Administration, with the exception of the first fund, established in 1921, The Nauru Royalty Trust Fund (Viviani, *Nauru*, p. 189), and that Fund had odd characteristics, which I will shortly describe.

Any proceeds from the export of phosphate paid to Nauruans were paid during the Mandate and Trust by the BPC by way of what was termed a "royalty". As Nauru has stated in its Memorial (Nauru Memorial, Vol. 1, paras. 492-493), the so-called "royalties" over the years were derisory and inequitable. Furthermore, Australian Government legal advisers had even questioned their legality under the 1919 Nauru Island Agreement and considered that they were granted by way of concession. It was not until a year or two before independence that one could have described the "royalty" payments as in any way adequate.

Land on Nauru is individually owned. Therefore, to gain access the miner had to lease the land and the Australian Administration provided this means through, as has been described, the Lands Ordinance 1921, with its subsequent amendment in 1927. The Commissioners under the Ordinance paid a lump sum, a once and for all sum, to the owner. The sum was a very small amount, being £40 per acre in 1927. When the lease was mined, the landowner was paid a "royalty" at so much per ton of phosphate exported. This was stated to be, for example, in 1927 at 7½d. per ton, but not all of that was actually paid in cash to the landowner. In 1927, for example, the landowner got a cash royalty of 4d. per ton, 1½d. was paid to the Administrator to be used solely for the benefit of the Nauruan people, and 2d. was paid to the Administrator to be held in trust for the landowner and invested at compound interest for 20 years. At the end of 20 years, the capital was retained and the interest paid every half year to the landowner or those to whom it was willed upon his decease.

The landowner was, however, in receipt of the cash "royalty" but once, that is, at the moment his land was mined. When mining was complete, the BPC may discharge the lease, provided the BPC had no further use for it but, of course, the land was then completely useless and often, too, entirely inaccessible (Nauru Memorial, Vol. 4, Ann. 36, Sect. 4 *(c)*.) In fact, in numbers of cases some decades passed before land reverted to the owner from the BPC.

It is proposed now, in chronological sequence, to mention these Funds.

First, the *Nauru Royalty Trust Fund* was established by the Administration in 1921. In the early years the payment into the Fund represented one-third of the total "Royalty" payable but was a lesser percentage as other Funds were established. The Fund was established for the purposes of funding education and other services for Nauruans. One might have imagined that education would have been financed out of monies set aside by the BPC to the Administration. But this was not so. Part of the "Royalty" paid to an individual landowner in fact was funded to pay for the educational services, such as they were, provided for all Nauruans. In other words, the landowners funded what was an essential government service — another example, perhaps, of "generosity".

It was not until much later in the post Second World War period that the Fund was used to support Nauruan commercial ventures, such as the Co-operative store. Upon independence it became the Nauru Royalty Fund and was, along with the Development Fund, the funding base of the present Nauru Local Government Council (the Constitution of Nauru, Sixth Schedule; Nauru Memorial, Vol. 4, Ann. 42). The Royalty Fund, to the extent that it was used for funding education, was in essence an education tax placed on landowners who were in receipt of royalties.

This is an opportune moment, Mr. President, to refer briefly to the system of public financing by Australia of Nauru under Trusteeship. This is described in the Nauru Memorial (Vol. 1, pp. 46-48). In simple terms, Nauru was wholly funded from royalties paid to the Administration, or to landowners, by the BPC out of the returns from phosphate. In essence, every ton of phosphate exported meant that the Nauruan Community was faced with a further piece of useless land which was paying, at its time of exploitation, for all the goods and services of the Australian Administration — an Administration which had undertaken solemn obligations to preserve the integrity of the land and community over which it had control. This is not meant to intimate that such land should never have been mined, but *rather* that it should not be mined, rendered thus useless, and then left without rehabilitation or just compensation.

Secondly, the *Nauru Landowners Royalty Trust Fund* was established at the insistence of the Nauruans in 1927 as a form of compulsory saving for landowners. A part of the landowners royalty was paid to the Fund and invested by the Administration. After 20 years the landowner or, where he was deceased, those holding by will or under intestacy, were entitled to the interest, and the capital re-invested. In 1955 the Fund was to be distributed both as to capital and interest after 15 years.

With independence the rules of the Fund were changed under the Nauru Phosphate Royalties Trust Ordinance of 1968. Payment out of the Fund to those entitled was to be of interest only, but not until 1993 or such earlier time as determined by the Government. The first payments are now being made from the Fund to those entitled landowners. Because of the extraordinarily wide landholding in Nauru, particularly rising from the intestacy provisions, something in the vicinity of one-half of the population are presently entitled to some payment from this Fund.

Thirdly, the Nauruan Community insisted that a specific fund be established for the purposes of accumulating capital for the needs and services of Government when the mining of phosphate ceases. This was known as the *Nauruan Community Long-Term Investment Fund* and was set up in 1947. This is the major Government fund. It has been recognized as such in Article 62 of the Constitution which describes it as "the Long Term Investment Fund". The Fund is invested according to law, and the income derived from monies invested are paid into the Fund. The Fund continues to accumulate and monies cannot be withdrawn or even used as collateral.

Article 62, Clause 3, of the Constitution sets that out:

> "Notwithstanding the provisions of Article 59, no moneys shall be withdrawn from the Long Term Investment Fund (otherwise than for investment under clause (2) of this Article) until the recovery of the phosphate deposits in Nauru has, by reason of the depletion of those deposits, ceased to provide adequately for the economic needs of the citizens of Nauru."

Fourthly, the *Nauru Housing Fund* was established at independence for the purposes of financing Nauruan housing. An intensive rehousing programme was undertaken at Government expense after independence which has now ceased. And housing, since 1987, is privately financed without Government subsidy and as a result that Fund now stands at a merely nominal figure.

Fifthly, the *Nauru Rehabilitation Fund* was also established at independence through the requirement of the Nauruan community to provide finance for a rehabilitation programme of mined-out phosphate land post 1 July 1967, the date when the Nauru Phosphate Agreement came into effect. As I stated earlier that stands at A$278 million. It is now close to a figure where its annual income could match the annual outlays on rehabilitation required on two-thirds of the mined-out area of the island. It is a specific purpose fund and cannot be used for other than rehabilitation.

The Funds, the Nauru Landowners Royalty Trust Fund, the Nauruan Community Long-Term Investment Fund, the Nauru Housing Fund and the Nauru Rehabilitation Fund, are all administered through an independently appointed statutory trust, the Nauru Phosphate Royalties Trust which reports annually and is accountable to the Nauru Parliament.

Australia has attacked Nauru for pursuing a claim against it whilst mining has proceeded on Nauru without any evidence that Nauru has been prepared to take action. It is thus implied that in some way this supposed conduct displays lack of good faith. The argument is patently without substance.

Rehabilitation is both a lengthy process in terms of time and very costly. At independence, so far as Nauru was concerned, it had no responsibility for that area already mined-out which was the responsibility of Australia. Because of the requirements of the Phosphate Agreement concluded in 1967, Nauru had to gear up its industry to meet the increased production demands of Australia embodied in that Agreement. At the same time, it was faced initially with very substantial payouts to the BPC for the island assets — $21 million. At that stage, the Rehabilitation Fund was virtually nil. There was, of course, no possibility of Nauru then entering itself a rehabilitation phase, though there was nothing to stop Australia.

When rehabilitation became more clearly an issue in the early 1980s, Australia firmly denied its responsibility when asked to contribute (Hawke letter, Nauru Memorial, Vol. 4, Ann. 79).

In the meantime, however, Nauru has assiduously stock-piled soil, built up a substantial Fund, held a major enquiry on responsibility and cost-feasibility, and is now involved in a trial project at substantial cost.

Nauru has certainly not done nothing. It has demonstrated very materially its continuing commitment to rehabilitation.

Before I conclude, two matters should be mentioned about the further argument that, in any case, Nauru has more money in its Fund than is required for rehabilitation of the whole island. Even if it were true, it is wholly irrelevant to the legal issue of responsibility.

The figure required for rehabilitation is plucked, however, so it seems, from the estimates of the Weeramantry Report which as that Report stated were only rough guidelines and should not be regarded as final or based on a sufficiently developed estimate. Over and above that fact, however, the money that is in the Rehabilitation Fund can, in terms of Nauru, be fairly used for Government development land use on the mined-out land once that land has been reformed and contoured in accordance with the rehabilitation process. The cost of such projects are likely to be substantial. A fund, therefore, of nearly A$300 million is unlikely to be sufficient given the time, complexity of the total development, and today's costs. But, of course, these are questions two stages removed from the present. This illustrates clearly that this matter is not of an exclusively preliminary character — it requires meticulous consideration of the facts which in this case have hardly been touched upon and require far more mature consideration.

What was said as long ago as 1967 in the Nauru Talks by the Nauru representatives was as true then as it is now:

> "we are well aware that our basic opportunities to survive as an independent people are being severely curtailed by such large expenditures on rehabilitation and we need every penny that we can get" (Nauruan Delegation Document 67/8, Nauru Memorial, Vol. 3, Ann. 5, p. 527, internal pagination p. 112).

In conclusion, Mr. President, it is evident that Nauru has exhibited consistency throughout as to its claim, it has adopted not only a serious attitude to the claim but has meticulously taken a very proper course with respect to rehabilitation. This is not the action of a State exhibiting bad faith. On the other hand it has acted with dignity and proper regard for the etiquette of the situation even when faced with the continuing intransigence of Australia. So far as the spendthrift claim of Australia is concerned this should be treated with contempt. The policies of the Nauru Government have always been open and democratically debated in Parliament and its budgets have always run the gauntlet of close scrutiny. As the distinguished Agent for Nauru has said, the Australian statements border on quite unacceptable intervention. In any case the point can well be made that not many countries of this imperfect world would have so parsimoniously organized its resources in Funds for continuous investment and accumulation to take care of its future as Nauru has done. I refer you also on this matter to the paper of K. E. Walker in the Appendix to Nauru Written Statement, pages 165 to 167.

Mr. President, Members of the Court, that concludes my argument. I thank you for your patience. I would ask you, Mr. President, or perhaps at this stage it is a time to adjourn, that Mr. Ian Brownlie will follow me.

The PRESIDENT: In this case your original estimate of 15 minutes seems to have been accurate. We will now adjourn for a slight break and come back as soon as possible to listen to Professor Brownlie.

The Court adjourned from 11.50 a.m. to 12.05 p.m.

STATEMENT BY MR. MANI

AGENT FOR THE GOVERNMENT OF NAURU

The PRESIDENT: Mr. Mani.

Mr. MANI: Thank you, Sir. On behalf of the Nauru delegation, I wish to apologize to you, Sir, and the Court for the inconvenience caused in terms of the time taken in our oral presentation. It appears there was some communication problem between me and the Registry staff and we will try our best not to be a cause of such lack of communication. Thank you Sir.

The **PRESIDENT**: Thank you very much, Professor Mani. What I was worried about actually was not so much the inconvenience of the Court but the inconvenience of your timetable going over the allotted time. But thank you very much for your apology, there is really no need to apologize, but we can arrange things between us, I am sure. Professor Brownlie.

ARGUMENT OF MR. BROWNLIE

COUNSEL FOR THE GOVERNMENT OF NAURU

Mr. BROWNLIE: Thank you, Mr. President. I would like to preface my presentation by emphasizing that the other side, as is its prerogative, has seen fit to cover, sometimes in a rather cloudy way, a wide range of what are in fact questions of fact and questions of documentary record and it is sometimes difficult, if one is to do it carefully, to reinstate the record; it takes sometimes a little time. And that is a matter entirely apart from the unfortunate problem of communicating to the Court the actual time which speeches will take.

I have to examine the history of the dispute and in doing so I will respond to the family of arguments concerning delay and waiver and I shall also, in due course, deal with the objection to jurisdiction based upon the reference to Australia's acceptance of the Court's jurisdiction to recourse "to some other method of peaceful settlement".

As a first step, I want to indicate certain significant features of the Australian argument.

In the first place, as the Preliminary Objections of Australia makes clear, Australia recognizes that the dispute concerning rehabilitation existed before independence. In particular, the respondent State accepts the continuity of the history of the dispute before and after independence.

None of the various Preliminary Objections is based on the axis of independence as such, although, of course, there is one argument related to the termination of Trusteeship.

The recognition of the continuity of the dispute since before independence is inherent in the logic of various Preliminary Objections proposed by Australia. Thus, the various forms of the waiver argument are each related to events prior to the independence of Nauru on 31 January 1968.

In the view of Nauru, this recognition of the continuity of the legal elements of the dispute about rehabilitation reflects the realities of the situation and constitutes a point on which the Parties have a common position.

The fact that the dispute concerning Australian responsibility for rehabilitation developed before independence provides a highly significant background to the allegation of waiver. The Nauru Local Government Council, the NLGC, has been recognized by the respondent State as the legitimate representatives of the Nauruan prople in the years prior to independence. And this recognition appears, for example, in these proceedings in the speeches of Mr. Griffith (CR 91/15, pp. 13-41) and Professor Bowett (CR 91/15, pp. 72-80; CR 91/16, pp. 8-25).

In the pre-independence period, the Nauruans were politically articulate and had sound leadership. However, it was only in 1964, if I may remind the Court, that they were permitted to have access to independent professional advisers and the reference is in the book by Nancy Viviani (Viviani, *Nauru*, 1970, p. 136). Moreover, the Nauruan leader, Mr. Hammer DeRoburt, appeared in the Trusteeship Council, designated as a member of the Australian delegation.

The circumstances in which the Nauru Local Government Council achieved independence included the existence of high quality leadership. And so, once adequate professional advice was forthcoming, the Nauruans, guided by Mr. Hammer DeRoburt, were able to formulate their negotiating strategy. The positions which emerged were clear and consistent and have remained so over the years.

Throughout the relevant negotiations and then after independence, certain Nauruan positions were carefully protected and maintained. Once the resettlement option had been laid aside in 1964, the leadership focused consistently upon the legal entitlements of Nauru in respect of rehabilitation. The atmosphere changed and a consciousness of the legal framework was present.

Thus, in the course of the 1966 Talks on the future of the phosphate industry, the Nauruan delegation made the following formal statement (this on 20 June):

> "The Nauruan people have consistently claimed that it is the fundamental responsibility of the Administering Authority to restore the mined phosphate lands to their original condition. *This responsibility stems in part from the obligation that the Administering Authority has under the United Nations Trusteeship System to safeguard the future of the Nauruan people.* It also stems from the very large profits from past mining activity that the Administering Authority has chosen to distribute to phosphate consumers in Australia, New Zealand and the United Kingdom (by not charging world prices) instead of returning them to the Nauruan people as their due entitlement." (Nauru Memorial, Vol. 3, Ann. 4, p. 333 at p. 340; Session of 20 June 1966, Sect. B, para. 1 *(emphasis added)*).

In the course of the talks leading to the Nauru Phosphate Agreement of 1967, on 19 April 1967, the Australian Chairman attempted to place upon the Nauruans the responsibility for rehabilitation. In a full written statement on the subject of rehabilitation the Nauruan delegation stated its position as follows (and that quotation has already been placed before the Court in the speech of my colleague, Professor Connell):

> "Before going any further the Nauruan delegation would like to correct what appears to be a misconception of the Partner Governments about our attitude to rehabilitation of the mined areas on Nauru. A few days ago (on 14th April) the Chairman re-stated the Governments' position that in your view the financial arrangements would be 'sufficiently liberal to take care of the Nauruan requirements, including rehabilitation or resettlement'. We do not agree with your attitude on this matter (for reasons we shall give later) but at least we understand what you are saying.
>
> However, the Chairman then said 'on rehabilitation you [the Nauruans] have accepted the responsibility for it provided that all the proceeds from the phosphate are available to the Nauruan people'."

In answer to that statement by the Chairman, the Nauruan delegation says:

> "This is *not* a correct statement of what we have been saying. It is correct only regarding areas mined *in future*. The Nauruan delegation has argued from the beginning that the responsibility for restoring the land already mined (about one third of the island) rests with the Partner Governments who cannot divest themselves of this responsibility merely by saying that they will not accept it." (Nauru Talks 1967, internal p. 140, Nauru Memorial, Vol. 3, Ann. 5, p. 555.)

The leader of the Nauruan Delegation to those Talks was, of course, Head Chief Hammer DeRoburt.

We then move on to the Meeting of the Trusteeship Council on 22 November 1967, where the Head Chief was present in his capacity as Special Adviser to the Australian delegation and spoke on the issue of Nauruan independence. There is then the famous paragraph 20 of the Record as follows:

> "20. On all those matters, full agreement had been reached between the Administering Authority and the representatives of the Nauruan people. There was one subject, however, on which there was still a difference of opinion — responsibility for the rehabilitation of phosphate lands. The Nauruan people fully accepted responsibility in respect of land mined subsequently to 1 July 1967, since under the new agreement they were receiving the net proceeds of the sale of phosphate. Prior to that date, however, they had not received the net proceeds and it was therefore their contention that the three Governments should bear responsibility for the rehabilitation of land mined prior to 1 July 1967. That was not an issue relevant to the termination of the Trusteeship Agreement, nor did the Nauruans wish to make it a matter for United Nations discussion. He merely wished to place on record that the Nauruan Government would continue to seek what was, in the opinion of the Nauruan people, a just settlement of their claims." (Trusteeship Council, *Official Records*, 13th Special Session, 22 November 1967, p. 3.)

This well-judged statement of the legal position was not contradicted by any delegation in the Trusteeship Council.

I now move on to a fairly recent example of the steadfastness and professionalism which the Nauruan leaders have shown in the conduct of their affairs, both before and after independence.

In a letter to the Australian Minister for Foreign Affairs dated 23 July 1987, the President of Nauru, at that time Mr. Hammer DeRoburt, made the following observations on the question of the disposal of the assets of the British Phosphate Commissioners:

> "I am sure, taking into account my Government's knowledge of the manner of accumulation of surplus funds by the British Phosphate Commissioners, that you would not be surprised if I were to say that I find it difficult to accept your statement that the residual assets of the British Phosphate Commissioners were not derived in part from its Nauru operations. I shall not, however, pursue that here but leave it perhaps for another time and another place." (Nauru Memorial, Vol. 4, Ann. 80, No. 14, p. 544.)

Mr. President, Members of the Court, these materials, and the record as a whole, reveal a pattern of consistent Nauruan conduct. The record, and the resolution and quiet persistence of the Nauruan leaders, does not, in our submission, provide a climate suitable for the making of waivers.

It is, indeed, the position of the respondent State which is characterized by a lack of consistency. A few examples of this will suffice.

Australia asserts that no claims were made to the Trusteeship Council or elsewhere on behalf of Nauru. At the same time it is argued that there was a comprehensive settlement of Nauruan claims in the Nauru Phosphate Industry Agreement of 1967.

Again, Australia asserts (*per* Professor Jiménez de Aréchaga) that the issues were settled through the action of the United Nations organs. At the same time it is argued that the Nauru Phosphate Agreement of 1967 constituted a comprehensive settlement of all outstanding questions.

I turn now to the Australian arguments of waiver and delay in presentation of the claim. But first the history of the dispute must be recalled.

THE HISTORY OF THE DISPUTE

This history can be summarized briefly as follows:

Stage one. By 1964 the Nauruans had determined to aim for rehabilitation of their homeland and the option of resettlement had been laid aside.

Stage two. In substantial negotiations in the years 1965 to 1967 the Nauruan Delegation maintained its position that there was a responsibility to restore land mined out.

Stage three. Independence is achieved in 1968 without a resolution of the issue of rehabilitation.

Stage four. After independence Nauru maintains its claim in respect of rehabilitation in the fact of Australian denial and refusal to negotiate.

In face of the documentary record the Australian Government has proposed a complicated series of arguments which are incompatible with the documentary record and to a great extent with each other.

"No Express Claim of Breach of the Trusteeship Agreement Was Ever Made" (Australia)

On behalf of Australia it has been argued that "no express claim of breach of the Trusteeship Agreement was ever made to either the Trusteeship Council or General Assembly" (CR 91/15, p. 74).

This argument is in fact presented in three interacting segments.

The most far-reaching proposition is that no express claim of breach was ever made. This argument involves segregating the breaches of the Trusteeship Agreement, and of Article 76, the United Nations Charter, from the obligations arising from the principles of general international law.

For the present I shall focus on the assertion that no express claim of a breach of the Trusteeship Agreement was made by Nauru. It is to be emphasized that the Australian argument refers precisely to the period before independence (see Professor Bowett, CR 91/15, p. 72).

The response of Nauru is two-fold. In the first place the Nauruan leadership was well aware of the legal framework within which the process of negotiation was taking place.

Secondly, even if, which is not admitted to be the case, even if, no express claim of breach of the Trusteeship Agreement was made, this is legally irrelevant.

The awareness of the existence of a legal framework for Nauru claims is evidenced in several ways. For Australia, Mr. Griffith has stated that the Trusteeship Council in 1966 "knew of the Nauruan claims", that is, concerning rehabilitation (CR 91/15, p. 40).

And General Assembly resolution 2111 (XX) of 21 December 1965 contains the following *considerandum*:

> "*Considering* the decision of the Nauruan people to stay on the island of Nauru and their request to the Administering Authority to restore, for habitation by the Nauruan people, the land worked out by the Phosphate Commission."

And that leads on to paragraph 4 of the operative part of the resolution, which provides

> "*Further requests* that immediate steps be taken by the Administering Authority towards restoring the island of Nauru for habitation by the Nauruan people as a sovereign nation."

The records of the negotiations which took place in 1965 contain substantial proof that the Delegation of the Nauru Local Government Council had a good appreciation of Nauruan entitlements in accordance with the Trusteeship régime. Annex A of the records, consisting of 19 pages, has the rubric "ownership of phosphate". The Annex contains a considerable number of passages based on legal considerations.

First passage (Annex A, Nauru Memorial, Vol. 3, Ann. 2, p. 134)

> "In the submission of the Nauruan people no legal basis exists for any period of years for extraction of or right to extract phosphate from the territory of Nauru except as may be justified in the capacity of the 3 Governments under their Trusteeship powers and for the proper performance of such powers for the sole beneficial interest of the Nauruan people."

Second passage (*ibid.*, p. 135)

> "Article 73 of the Charter of the United Nations reaffirms and underlines the concept of Trustee Nations administering the Territories of peoples who have not yet attained self government. The progression of such peoples to independence and self government contemplates withdrawal of the Trustee powers and the cessation of any control of their territory or affairs. As a further consequence there is implicit a recognition of the fundamental right of such peoples thereafter to utilize their own lands and resources for their own future development and benefit free from any alleged proprietory rights of commercial exploitation by the Trustee Administrators for their own benefit."

Third passage (*ibid.*, pp. 137-138)

This passage is very involved and consists of five consecutive claims. The series of paragraphs contains repeated references to Trusteeship, the Trusteeship régime and the concept of Trusteeship. And it is impossible to look at these documents without believing that the Nauruan Delegation were perfectly aware of the legal framework and the legal concepts in relation to which the claim was being presented.

> "5. There is a recognition in the Trusteeship concept since 1919 that the exercise of authority and rights by the Administering Powers in Nauru was and is fundamentally for the Nauruan people. It follows that where an exploitation takes place of natural resources of the Island all profit derived therefrom is the beneficial right of the Nauruan people subject to the reasonable and proper costs of production and a reasonable management fee.
>
> 6. It is a further duty and obligation of Trusteeship to preserve the territory being administered to serve the Nauruan people for their proper existence, development and advancement.
>
> 7. In exercising powers of administration there should not be permitted any exploitation which would have the effect of rendering the physical enjoyment of the Island less advantageous at any point of time to the continued living conditions thereon of the Nauruan people should they elect and desire to remain on the Island. Conversely there should not be permitted any exploitation in any fashion detrimental or inimical to the continued existence of the Nauruan people on the Island.
>
> 8. The concept of Trusteeship and acceptance by an enlightened nation inherently carries with it an obligation to raise the standards, status, educa-

> tion and living conditions generally of the people of the trust territory and to expend moneys of the administering powers to these ends.
>
> 9. It is not a valid approach to finance that all the administration's activities within the Island pursuant to its obligations should be paid for out of the resources of the territory and certainly not to deplete those resources to exhaustion point in the process."

And there are other relevant items in the record of the 1965 talks:

1. Mr. Shrapnel, *Record*, 7 June 1965, p.m., pages 1 to 2; Nauru Memorial, Annex 2, pages 88 to 89.

2. *Record of Negotiations*, Annex F, *ibid.*, pages 166 to 169: Annex entitled "Rehabilitation of Nauru (Financial and Technical Requirements)".

3. *Record of Negotiations*, Annex L, *ibid.*, pages 194 to 196 (Summary of Conclusions), at pages 195 and 196 (item 3: "Rehabilitation of Nauru").

Mr. President, Members of the Court, the record shows that by June 1965 the Nauruan Delegation, led by Head Chief Hammer DeRoburt and including a legal adivser, was formulating claims, referred to as such, and doing so within the legal framework of the Trusteeship régime.

This pattern of arguments and claims was thus established as early as 1965, and was maintained in the Canberra talks of 1966.

At the Fifth Session of these talks, on 20 June 1966, the statement of the Head Chief (which appears as Annex 11 to the *Record* of the Fifth Session) includes the following passages (Nauru Memorial, Ann. 4, pp. 340-341):

First:

> "9. Perhaps our views will be considered unsophisticated, but the Nauruan delegation feels that the principle to be observed should be the responsibility of Trusteeship to protect the interests of the Nauruan people rather than to minimize the cost of restoring our homeland to its former condition."

There are then a series of passages which follow under the heading "The Responsibility for Rehabilitating Nauru":

Second:

> "1. The Nauruan people have consistently claimed that it is the fundamental responsibility of the Administering Authority to restore the mined phosphate lands to their *original* condition. This responsibility stems in part from the obligation that the Administering Authority has under the UN Trusteeship system to safeguard the future of the Nauruan people. It also stems from the very large profits from past mining activity that the Administering Authority has chosen to distribute to phosphate consumers in Australia, New Zealand and the United Kingdom (by not charging world prices) instead of returning them to the Nauruan people as their due entitlement."

Third:

> "3. The Council wishes to make it quite clear that it is prepared to assume responsibility (there is this constant use of such words) responsibility for rehabilitating any land mined *after* the Nauruan people receive the full economic return on the phosphate to which they are entitled. The financial responsibility for rehabilitating land *already* mined, or that will be

> mined before the Nauruan people receive the full return on the phosphate, clearly belongs to the BPC and through them to the Administering Authority. In essence what the Nauruan people are saying is that had they been an independent State prior to the mining of phosphate they would still have mined it, sold it at world prices, and then rehabilitated the land themselves. This they will do from the moment they receive the full economic benefit from the phosphate. If the Nauruan people were now to receive the full economic benefit from the phosphate they would meet some 62% of the total cost of rehabilitation, and the Partner Governments would be responsible for only 38% (which could easily have been financed from past profits)."

At the tenth session of the Talks in 1966 the Joint Delegation, in its comments on the Nauruan proposals, suggested "that the issue of rights on either side be put aside for the present in the endeavour to get a practical working arrangement" (Nauru Memorial, Ann. 4, p. 391). The record explicitly notes the "inability to reach agreement" on the issues of rehabilitation and resettlement.

The proceedings leading up to the adoption of the Heads of Agreement for the Nauru Phosphates Agreement of 1967 did not involve any contradiction of the well-developed Nauruan position on rehabilitation.

Neither the Heads of Agreement resulting from the 1967 Talks (Nauru Memorial, Vol. 3, Ann. 5, p. 420) nor the provisions of the Nauru Island Phosphate Industry Agreement (*ibid.*, Ann. 6) contained any reference to the issue of rehabilitation.

This is not in any way surprising. The record of the discussions of 1967 shows without a shadow of doubt that the Nauruan Delegation had maintained its position on responsibility for rehabilitation and that, as a natural result, the question had been reserved.

Thus the record of the Talks during the evening session of 16 May 1967 includes the following passage:

> "*During the following discussion* it emerged that the Nauruans would still maintain their claim on the Partner Governments in respect of rehabilitation of areas mined in the past, even if the Partner Governments did not press for the withdrawal of the claim in a formal manner such as in an agreement." (Nauru Memorial, Vol. 3, Ann. 5, p. 461 at p. 466.)

The record shows that the Nauruan position on responsibility was presented within a legal framework and was maintained with care and consistency throughout.

However, Australia has argued that at no time did Nauru make an express claim of breach of the Trusteeship Agreement. This argument has at least the attraction of being probably the most unmeritorious plea ever presented to this Court.

The record of the negotiations shows that, given the situation as it then was, express reference was made to responsibility for the discharge of obligations arising from the Trusteeship Agreement. Such a statement was made at the session of 20 June 1966.

The context, it has to be recalled, was a series of negotiations. No claim as such was called for because it was not until the final conclusion of the Nauru Island Phosphate Industry Agreement of 1967 that it became clear that the Australian Government would not recognize a responsibility for rehabilitation.

And so it was not until the second half of 1967 that it was finally established that the issue would remain unresolved at the time of independence.

The views propounded on behalf of Australia call for the party who anticipates a breach of a legal dispute to prepare his writ well in advance. Apparently, the Nauruans were expected to turn up to the Canberra Talks with a document which foreshadowed more or less the precise contents of the Application, embellished possibly with citations from Oppenheim and other authorities.

In our submission the Nauruan representatives made their position in all respects sufficiently clear, and the Australian argument is divorced from a commonsense appreciation of the relationship between political negotiations and the legal significance to be attached to such negotiations.

The argument also lacks a legal foundation. The position of Australia, as expressed by Professor Bowett (CR 91/15, pp. 74-80) is that Nauru did not present any express claim of breach of the Trusteeship obligations to either the Trusteeship Council or to the General Assembly. And there is a more general implication in the Australian pleadings that no such claim was presented in any other forum.

There are many weaknesses in this contention.

First of all, the Nauruan representatives always reserved their rights in respect of rehabilitation, and, in the context of negotiations and given the realities of diplomacy, this was the necessary and appropriate equivalent of presenting a claim.

Secondly, there could be no question of presenting claims until the questions to which the claims related were finally left unresolved.

Thirdly, there is no requirement in international law that a claim be presented in formal terms. In the *Northern Cameroons* case the Court adopted a practical test for the existence of a dispute. The Court found as follows:

> "The Court is not concerned with the question whether or not any dispute in relation to the same subject-matter existed between the Republic of Cameroon and the United Nations or the General Assembly. In the view of the Court it is sufficient to say that, having regard to the facts already stated in this Judgment, the opposing views of the Parties as to the interpretation and application of relevant Articles of the Trusteeship Agreement, reveal the existence of a dispute in the sense recognized by the jurisprudence of the Court and of its predecessor, between the Republic of Cameroon and the United Kingdom at the date of the Application." (*I.C.J. Reports 1963*, p. 27.)

The criterion of the "opposing attitudes of the Parties" was also applied in the Advisory Opinion of this Court in the *Headquarters Agreement* case of 1988 (*I.C.J. Reports 1988*, p. 28). In that Opinion the Court emphasized that it is not necessary that a party formulate its legal position in order to establish the existence of a dispute. In the words of the Advisory Opinion:

> "In the view of the Court, where one party to a treaty protests against the behaviour or a decision of another party, and claims that such behaviour or decision constitutes a breach of the treaty, the mere fact that the party accused does not advance any argument to justify its conduct under international law does not prevent the opposing attitudes of the parties from giving rise to a dispute concerning the interpretation or application of the treaty. [And the Opinion then goes on to rely on the findings in the Judgment in the case of *United States Diplomatic and Consular Staff in Tehran*.] In the case concerning *United States Diplomatic and Consular Staff in Tehran*, the jurisdiction of the Court was asserted principally on the basis of the Optional Protocols concerning the Compulsory Settlement of Disputes

> accompanying the Vienna Conventions of 1961 on Diplomatic Relations and of 1963 on Consular Relations, which defined the disputes to which they applied as 'Disputes arising out of the interpretation or application of' the relevant Convention. Iran, which did not appear in the proceedings before the Court, had acted in such a way as, in the view of the United States, to commit breaches of the Conventions, but, so far as the Court was informed, Iran had at no time claimed to justify its actions by advancing an alternative interpretation of the Conventions, on the basis of which such actions would not constitute such a breach. The Court saw no need to enquire into the attitude of Iran in order to establish the existence of a 'dispute'; . . .) (*I.C.J. Reports 1988*, p. 28, para. 38.)

The logic of this passage, referring as it does to the posture of the Respondent is in essence that the elements of a dispute may emerge with sufficient clarity from the circumstances.

Before leaving the Australian assertion that no claim of breach of the Trusteeship Agreement was made to the Trusteeship Council or to the General Assembly, it is worth pointing out that in factual terms this assertion lacks substance.

The question of rehabilitation was therefore, Mr. President, a matter of general reputation and public record in the United Nations organs and especially in the Reports of the Trusteeship Council. As Mr. Griffith stated the matter in his opening speech to the Court in these proceedings: "The records make it clear that the United Nations was very much aware of the Nauruan rehabilitation claim." (CR 91/15, p. 40.)

Moreover, whilst Nauru does not accept the inferences drawn by Professor Jiménez de Aréchaga in his argument concerning the other methods of peaceful settlement (CR 91/15, pp. 44-69), the factual premise of that argument is to be recalled. Professor Jiménez de Aréchaga argues that the action of the competent United Nations organs resulted "in the settlement of all the facets of the dispute which Nauru brings before the Court" (CR 91/15, p. 44). How, it may be asked, could the organs settle all facets of the dispute if Professor Bowett is correct in his argument that Nauru made no express claim of breach to either the Trusteeship Council or the General Assembly (CR 91/15, pp. 74-80)?

THE AUSTRALIAN ARGUMENT BASED ON WAIVER

But, of course, Australia contends that even if a claim was made it was waived by the representatives of Nauru prior to independence.

The position of Nauru is that the issue of waiver does not have an exclusively preliminary character but that, in any event, there has been no waiver of the claim relating to rehabilitation at any stage.

At the outset it is legitimate to point out the quite exceptionally tortured logic of the Australian arguments concerning waiver.

First of all, the Australian argument as to waiver can only operate if it is accepted that Nauru had a valid claim for breach of the Trusteeship Agreement. Now, Mr. President, arguments in the alternative may often work well but this one, I submit, does not. It is rather like the position of the lawyer who once had to resist a warrant for extradition of his client from the United Kingdom to the Republic of Ireland on the basis that his client was totally innocent of the charge, but that in any event the offence was political. That is a difficult argument to put, because the factual premises are inconsistent with each other.

There is a further source of tension between the argument that the Nauru Island Phosphate Industry Agreement of 1967 constituted a comprehensive settlement and the argument that the claim had survived this only to be, it is alleged, waived as a consequence of a speech delivered by the Head Chief on 6 December 1967.

The evidence offered by Australia in support of the thesis of waiver is fragmentary and equivocal. The overall pattern of Nauruan conduct is ignored. The ordinary principles of logical inference are ignored. If a Nauruan leader makes a single statement which fails to refer to rehabilitation, this is a waiver. Overall consistency of conduct and evidence of persistence in the pursuit of legitimate goals counts for nothing.

In the submission of Nauru superficial inconsistencies cannot derogate evidentially from the general weight of the evidence concerning the position of the Nauruan Local Government Council prior to independence. As the Court stated in the *Anglo-Norwegian Fisheries* case:

> "it is impossible to rely upon a few words taken from a single note to draw the conclusion that the Norwegian Government had abandoned a position which its earlier official documents had clearly indicated" (*I.C.J. Reports 1951*, p. 138).

It is well recognized in the literature of international law that the renunciation of legal rights is not to be presumed (citations in the Written Statement of Nauru, pp. 62-63, para. 168).

So much for the relevant legal principles.

I now wish to examine the exiguous material alleged by Australia to provide evidence of waiver.

The 1966 Talks

Professor Bowett produces a statement from an Agreed Minute of the discussions held in Canberra in 1966, which reads as follows:

> "The Nauruan view was . . . that they should receive the full financial benefit from the phosphate industry, so that there would be funds available to rehabilitate the whole of the island." (Nauru Memorial, Vol. 3, Ann. 4, p. 407.)

Mr. President, Members of the Court, this is not evidence of a waiver. The full text of the statement reveals the non-committal flavour of the passage. The text will appear in the transcript and the context can be adequately examined by the Court and a view taken:

> "The Nauruan view was that rehabilitation of Nauru was a matter of primary concern for the Nauruan people. They indicated that they were pursuing the rehabilitation proposals in the absence of any acceptable proposal for resettlement. They said that they should receive the full financial benefit from the phosphate industry so that there would be funds available to rehabilitate the whole of the Island. The Joint Delegation explained that the benefits to be received by the Nauruan community from the proposed phosphate arrangement would, it was envisaged, be adequate to provide for the present and long-term security of the Nauruan community including an adequate continuing income when the phosphate has been exhausted and when the costs of any resettlement or rehabilitation have been met. The Joint Delegation said they would be prepared to consider that, within the

> framework of a long-term agreement, arrangements be made for an agreed payment into the long-term investment fund, from which the costs or part of the costs of rehabilitation could be met. It was agreed that the report of the Committee on Rehabilitation should be examined by the Working Party."

The passage contains no indication of a waiver, even when it is read as a whole. What is revealed by the record is that the Nauruan representatives had insisted that it was "the fundamental responsibility of the Administering Authority to restore the mined phosphate lands to their original condition". I have already referred in this speech to various passages in the *Record of Negotiations* of 1966 which indicate the extreme implausibility that in the "Agreed Minute", quoted in its fragment by Counsel for Australia, there is an implied waiver of the rehabilitation claim.

Moreover, at the tenth session of the 1966 Talks, the record of the meeting contains the passage:

> "The discussion on rehabilitation and resettlement suggested that inability to reach agreement on those matters would not necessarily hold up the rest of the arrangements." (Nauru Memorial, Vol. 3, Ann. 4, p. 392.)

It may be noted that the "Agreed Minute" of 1966 does not refer to any agreement reached on the question of rehabilitation and therefore the item reappeared quite naturally on the agenda of the subsequent talks in 1967.

So, there was no question of a waiver during the period 1966.

After a fragmentary excursion into the documentary record for 1966, counsel for Australia alleges that "over the next few months a significant change occurred in Nauruan thinking, and they decided that they would hold the Partner Governments responsible for rehabilitating areas mined pre-independence" (CR 91/16, p. 20).

Of this assertion by Counsel two things may be said. There is no sufficient evidence to justify the view that this involved a change of mind. And the logical assumption is surely that any responsibility could only relate to the pre-independence mining. To spell this out would not involve a "significant change". It really went without saying.

Moreover, if Counsel for Australia is correct in his view that "they decided that they would hold the Partner Governments responsible for rehabilitating areas mined pre-independence", then a claim was indeed made by the representatives of the Nauruan people.

This claim, alleged to be new by Counsel for Australia, was presented during the Canberra Talks in 1967. This is accepted by Australia, and so Professor Bowett on Tuesday morning stated:

> "In the record of the meeting on 20 April 1967 there is noted a statement by the Nauruans that they accepted responsibility for rehabilitation in respect of future mining, post-independence, but not past mining." (CR 91/16, p. 20.)

He also stated that "the Partner Governments sought to persuade the Nauruans to withdraw their claim" (*ibid.*).

And so what is noteworthy is that the Australian Government, through its Counsel, makes no reference to repudiation of the Nauruan claim by Australia. If the claim was made so clearly why was it not repudiated?

The Partner Governments are reported simply to have sought "to persuade the Nauruans to withdraw their claim". The reason given for this enterprise, Mr. President, is not the absence of any legal basis for the claim but the fact that:

> "the Partner Governments consider that the proposed financial arrangements on phosphate cover the future needs of the Nauruan community including rehabilitation or resettlement" (Nauru Memorial, Vol. 3, Ann. 5, p. 575; as quoted by Professor Bowett, CR 91/16, p. 20; Joint Delegation 67/2).

As Professor Bowett admits, the attempt at persuasion failed (CR 91/16, p. 21).
The *Record of Discussion* relating to the evening meeting of 16 May 1967 contains the following report:

> "During the following discussion it emerged that the Nauruans would still maintain their claim on the Partner Governments in respect of rehabilitation of areas mined in the past, even if the Partner Governments did not press for the withdrawal of the claim in a formal manner such as in an agreement." (Nauru Memorial, Vol. 3, Ann. 5, p. 461 at p. 466.)

The record of the 1967 Talks is absolutely clear on the question of rehabilitation, and so also is the view of the Nauruan Delegation, which made a series of statements on the subject.
Thus, the Nauruan Delegation's Statement 67/2 of 19 April 1967 contains the passage:

> "The two matters of future rehabilitation and past rehabilitation are quite separate and distinct and we cannot see why trust powers should try to force us to abandon our sincerely held views regarding governmental responsibility for rehabilitation as a pre-condition to any long term agreement."

At the afternoon session of 17 May 1967, the Nauruan Delegation was specifically asked to agree to "an understanding on rehabilitation which would mean that the Nauruans would not continue to press this subject and linked with rights of immigration into Australia and New Zealand". There is then a Nauruan Delegation Paper 67/8 of 18 May 1967 which replies to this invitation at great length. It was read out during the Talks on the same day:

> "*Rehabilitation*
>
> 9. The Partner Governments have restated their position that the proposed financial arrangements on phosphate cover the future needs of the Nauruan community including rehabilitation or resettlement. The Nauruan Delegation is disappointed that they should be asked to renounce their sincerely held beliefs on this matter (formally or informally) as one of the collective pre-conditions necessary to obtain agreement.
>
> 10. The facts are that the Partner Governments have already rendered nearly one third of the island uninhabitable without having made any financial provision to restore the land that they have mined without our consent. The Nauruan people are prepared to take the financial responsibility of restoring land that is mined in the future when they are receiving the full economic benefits from the phosphate. However, the need for rehabilitation stems directly from the mining operations and the Partner Governments carry their share of the obligation to restore the mined areas whether they have provided for this in the past or not.
>
> 11. The Nauruans preferred resettlement as being a cheaper solution for the Partner Governments and ourselves. However, the failure of resettlement proposals to provide a secure future and preserve our national identity has forced us into an extensive rehabilitation project because we are at least

> satisfied that we can obtain on Nauru a prospect of national survival that would be denied us under any alternative proposal that the Partner Governments have yet put to us.
>
> 12. However, the cost of any reasonable rehabilitation of Nauru is so large that we cannot understand why the Partner Governments are not content with the considerable benefits they have already obtained from the phosphate (about $150 million from 1949 to 1965 in the form of phosphate obtained at less than world prices). Apparently the Governments want to make even more money at our expense as well as imposing a condition that we renounce all claims regarding the responsibility to rehabilitate the land already mined. Of course we know that little Nauru cannot force three important countries to make any such payments but you also ask us to deny our beliefs. Whichever way we look at it the Nauruans are the main losers from the need to rehabilitate the island. We value the freedom that we can attain on Nauru sufficiently to face the cost of rehabilitating lands that we mine in the future, but we are well aware that our basic opportunities to survive as an independent people are being severely curtailed by such large expenditures on rehabilitation and we need every penny that we can get. We are not prepared publicly or privately to accept the Partner Governments' view that the proposed financial arrangements are adequate to cover our future needs including rehabilitation or resettlement." (Nauru Memorial, Vol. 3, Ann. 5, p. 523, at pp. 525-527.)

And so, there is no evidence whatsoever that the carefully formulated positions in these documents were subsequently departed from or compromised.

There were further talks leading to the adoption of the Heads of Agreement for the Nauru Phosphate Agreement on 15 June 1967 (Nauru Memorial, Vol. 3, Ann. 5, p. 419), but these Talks simply did not deal with the subject of rehabilitation and so it does not feature in the Heads of Agreement.

Australia finds no evidence of waiver in the record of the Talks in 1967 but Counsel for Australia remains undaunted.

After the Talks, he tells the Court "no more is heard of the claim" (CR 91/16, p. 21) and "from the middle of May until the signing of the Canberra Agreement on 14 November 1967 all was silence" (*ibid.*, p. 22).

Mr. President, in this case, silence is always supposed to be eloquent and the eloquence always speaks in favour of Australia.

The silence on this occasion has no particular significance, not least because the position of Nauru was very much on record already.

Not having discovered any waiver thus far, Counsel for Australia arrives chronologically at the Agreement relating to the Nauru Island Phosphate Industry which was actually signed on 14 November 1967.

Like the Heads of Agreement, the Agreement itself contains no reference to rehabilitation. It does, however, deal with an extensive range of matters directly related to the transfer of ownership of the phosphate industry, arrangements for the management of the industry on Nauru, and so forth.

The Australian position, expressed by Mr. Griffith, is that the Canberra Agreement constituted a comprehensive settlement, in which "the Nauruan claim for rehabilitation was settled, satisfied or waived . . ." (CR 91/15, p. 38).

Mr. Griffith states that four questions, of which one was rehabilitation, were settled by the Canberra Agreement. In his words:

> "This is because the Partner Governments and Nauru, by its representatives, agreed at the time the Canberra Agreement was made that all four issues should be laid to rest, as between the Administering Authority and

> the Nauruan community, on the basis that, on its forthcoming independence, Nauru would take over ownership and full control of the phosphate deposits, the phosphate industry, and its associated investment funds. This meant that Nauru might in the future make its own choices, whether or not for rehabilitation". (CR 91/15, p. 39.)

Mr. President, Members of the Court, no evidence is given for any of these assertions. The documentary record establishes that the issue of rehabilitation had been the subject of a careful and consistent set of reservations of rights by the Nauruan representatives.

The Agreement contains no clause concerning waiver. Given the history of the negotiations this strongly suggests that no waiver took place. Indeed, given the prominence of the claim concerning rehabilitation in the documentary record, if Australia had succeeded in extracting such a concession, an express relinquishment of the claim would have been natural.

But, there is no waiver clause and in the Trappist theory of law espoused by Australia in this case, this silence is to be nonetheless interpreted as a waiver. But it is beyond the bounds of ordinary sense to assume that Nauru would relinquish a long-held position *sub silentio*.

Certainly, Nauru's representatives did not interpret the Agreement in this way and Mr. Hammer DeRoburt restated Nauruan claims in the Trusteeship Council, shortly after the signing of the Agreement, on 22 November 1967. In this statement, Mr. Hammer DeRoburt expressly addressed the rehabilitation issue and the purpose of the statement was expressed to be "to place on record that the Nauru Government would continue to seek what was in the opinion of the Nauruan people, a just settlement of their claims" (Trusteeship Council, *Official Records*, 13th Special Session, 22 November 1967, p. 3).

The absence of a waiver clause is explained by my friend Professor Bowett on the basis of a series of propositions totally unrelated to the record of the negotiations, the text of the Agreement or any other document (CR 91/16, p. 22).

At this point, I would respectfully remind the Court of the nature of the Agreement concluded on 14 November 1967. It is an Agreement relating to the Phosphate Industry. No reference is made to the Trusteeship Agreement or to the United Nations Charter.

The Parties were expressed to be the Nauru Local Government Council, of the one part, and the Partner Governments, of the other part.

Professor Bowett analyses this transaction in a completely novel way and as a sort of *contrat d'adhésion*, a contract of adhesion. Thus he says:

> "The Partner Governments had insisted throughout that they did not accept the Nauruan claim and that the financial terms they were offering were a sufficient discharge of any obligation the Nauruans might think they owed. That was the offer in the 1967 Agreement, and it was signed and accepted by Nauru. The question is, was that, or was it not, a waiver of the Nauruan claim?",

and Counsel for Australia continues:

> "If you look at the transaction in terms of simple offer and acceptance, then there is no doubt that the Nauruans knew the Partner Governments were offering a comprehensive settlement. They knew that, if they again voiced their claim, the offer would be withdrawn, or at least reduced in value. So they kept their silence." (CR 91/16, p. 22.)

On this analysis by Australia, the entire Agreement as a single document is an offer and the Nauruan alleged silence is an acceptance of that offer.

The fact that the text of the Agreement is integral and bilateral, is ignored.

The fact that the Agreement was a part of the entire series of Canberra Talks, is ignored.

The fact that, treated as a unilateral offer, the Agreement makes no reference to any economic ultimatum of the type suggested by Australia, is ignored.

The fact that neither the text of the Agreement nor any other document makes reference to a Nauruan acceptance of such an offer is ignored.

Mr. President, silence can only be eloquent, if at all, within a framework composed of law and common sense.

The Statement of 22 November 1967

In his pilgrimage in search of waiver, Counsel for Australia arrives next at the statement made by Mr. Hammer DeRoburt in the Trusteeship Council on 22 November 1967. This statement maintains the Nauruan position in the clearest possible language. I think it is a passage which is sufficiently familiar to the Court at this stage:

> "On all those matters, full agreement had been reached between the Administering Authority and the representatives of the Nauruan people. There was one subject, however, on which there was still a difference of opinion — responsibility for the rehabilitation of phosphate lands. The Nauruan people fully accepted responsibility in respect of land mined subsequently to 1 July 1967, since under the new agreement they were receiving the net proceeds of the sale of phosphate. Prior to that date, however, they had not received the net proceeds and it was therefore their contention that the three Governments should bear responsibility for the rehabilitation of land mined prior to 1 July 1967." (Trusteeship Council, *Official Records*, 13th Special Session, 22 November 1967, p. 3.)

Counsel for Australia contends, first, that this "statement of preservation of claims" was too late because, in Australia's view, such a statement "had to be made before the Canberra Agreement was signed, not after" (CR 91/16, p. 24).

And this surely is simply a repetition of the argument that the Canberra Agreement constituted a waiver of all outstanding claims.

But a further point is made. On behalf of Australia it is argued that the statement "had to be made directly to the Partner Governments, not the Trusteeship Council" (CR 91/16, p. 24). But in fact this is based on the same assumption that the 1967 Agreement constituted a waiver.

In passing it may be noted that Professor Bowett considers that the statement on behalf of Nauru was "addressed to the wrong audience", whereas Professor Jiménez de Aréchaga in another speech asserts that the United Nations organs were engaged in the settlement of the Nauruan claims.

The Statement of 6 December 1967

I now come to the statement of 6 December 1967. This is the statement before the Fourth Committee of the General Assembly and for Australia it is stated that "we are entitled to treat that statement as a clear waiver" (CR 91/16, p. 25).

What then was the statement relied upon so extensively in the Australian pleadings?

The abbreviated version offered by Counsel for Australia is as follows:

> "One [problem] which worried the Nauruans derived from the fact that land from which phosphate had been mined would be totally unusable. Consequently, although it would be an expensive operation, that land would have to be rehabilitated and steps were already being taken to build up funds to be used for that purpose . . . The revenue which Nauru had received in the past and would receive during the next 25 years would, however, make it possible to solve the problem." (Preliminary Objections of Australia, Ann. 30, para. 20; CR 91/16, p. 24.)

Counsel for Australia then offers the following construction of this passage. He says:

> "You will note that the 'problem' he refers to [that is the Head Chief, Mr. Hammer DeRoburt refers to] is the whole problem of rehabilitation, not just that produced by post-1967 mining. And he speaks of this as a Nauruan problem. There is no mention [says Australian Counsel], this time, of any continuing responsibility in the Partner Governments or of any claim against the Partner Governments."

Mr. President, the complete passage reads as follows and with your permission I would like to present the complete passage. The Head Chief said:

> "That economic base, of course, presented its own problems. One which worried the Nauruans derived from the fact that land from which phosphate had been mined would be totally unusable. Consequently, although it would be an expensive operation, that land would have to be rehabilitated and steps were already being taken to build up funds to be used for that purpose. That phosphate was a wasting asset was, in itself, a problem: in about twenty-five years' time the supply would be exhausted. The revenue which Nauru had received in the past and would receive during the next twenty-five years would, however, make it possible to solve the problem. Already some of the revenue was being allocated to development projects, so that Nauru would have substantial alternative sources of work and of income long before the phosphate had been used up. In addition, a much larger proportion of its income was being placed in a long-term investment fund, so that, whatever happened, future generations would be provided for. In short, the Nauruans wanted independence and were confident they had the resources with which to sustain it." (General Assembly, *Official Records*, 22nd Session, 1739th meeting, A/C.4/SR.173, p. 395.)

As the distinguished Agent of Nauru has pointed out to the Court, Australian quotations of this passage, including the version offered by Australian Counsel on 12 November, omit the following sentence: "That phosphate was a wasting asset was in itself, a problem; in about twenty-five years' time the supply would be exhausted."

And so the prospect of the disappearance of the phosphate revenue was the problem referred to by Mr. Hammer DeRoburt and not, as Counsel for Australia asserts, the question of rehabilitation.

And, Mr. President, the statement relied on by Australia contains no single phrase indicating a renunciation of the claim regarding rehabilitation.

The Australian argument in its essentials is simply that the statement on 6 December does not expressly reserve the claim to rehabilitation. Once again, we have an example of silence which is supposed to be inimical to Nauru.

At this point Nauru finds it necessary to make for itself a brief excursion into the jurisprudence of silence.

The Court will recall the emphatic statement of the Nauruan position on the responsibility for rehabilitation by Mr. Hammer DeRoburt on 22 November 1967. This is the thirteenth special session of the Trusteeship Council. That session was attended by a representative of Australia, Mr. Shaw. The *Official Records* for the sessions on 22 and 23 November disclose no reaction on the part of the Australian representative to the very clear statement made by Mr. Hammer DeRoburt.

If the Australian interpretation of the Phosphate Industry Agreement is correct, Mr. Shaw should have evinced surprise and indignation for, after all, the Agreement had only been signed a short time before; and, on the Australian view we are now asked to entertain, had settled the question. But no protest was made.

It must follow, in our submission, that Mr. Hammer DeRoburt would have no reason to suppose on 6 December that Australia did not accept his views as expressed on 22 November and no reason to suppose that his speech on 6 December could be construed as a repudiation of a long held position.

The Court rose at 1.00 p.m.

CR 91/20

SIXTH PUBLIC SITTING (19 XI 91, 9.30 a.m.)

Present: [See sitting of 11 XI 91.]

Professor **BROWNLIE**: Yesterday, I had made an attempt to reconstitute the documentary history of the dispute with particular reference to the Talks of 1965, 1966 and 1967.

In order to deal with two Australian assertions, the first that no legal claim was ever made by the representatives of Nauru, and the second that if indeed such a claim was made, then at some point in time it was waived by Nauruan representatives. I had reached the two episodes of 22 November and 6 December 1967, which are featured a great deal in the pleadings, with the Head Chief Mr. Hammer DeRoburt on 22 November making a very clear statement of the Nauruan legal position on rehabilitation and then making a statement on 6 December 1967, in which no reference is made to that question. I had looked at the circumstances in which the statement of 6 December had been made.

Mr. President, I want to make two final comments on the significance of the statement of 6 December.

The first is that no delegation attending the Fourth Committee meetings at the 22nd session of the General Assembly interpreted the statement as a waiver of the claim to rehabilitation. On the contrary, there were statements made by several delegations referring to the outstanding rehabilitation question (I refer to the Preliminary Objections of Australia, Vol. II, Annexes, p. 263, para. 22, which was the statement of the Soviet delegate, and p. 266, para. 5, the statement of the Indian delegate).

The second overall point is that the general pattern of conduct on the part of Nauruan representatives in the material period is what should count, and that the pattern of conduct by those representatives from 1964 until independence completely contradicts the Australian thesis of waiver.

UNITED NATIONS RESOLUTIONS

The final stages of the achievement of independence was supervised and monitored by the relevant United Nations organs.

There is no evidence whatsoever to suggest that the pertinent resolutions of the Trusteeship Council and General Assembly involve a recognition of the existence of a waiver of rights on the part of Nauru.

But, such silence is never an obstacle in the eyes of Australia. For Australia, the logic is very simple. And, thus, for them, the 1967 Agreement involved a renunciation of Nauruan claims (though it did not say so).

For Australia, the United Nations organs were aware of the terms of the 1967 Agreement and so, when resolutions relating to independence were adopted, these, Australia says, involved recognition of the renunciation of Nauruan claims (though the resolutions did not say so).

This is the house of cards presented, for example, by Mr. Griffith at the first session of these hearings (CR 91/15, pp. 40-41). And Mr. Griffith stated proposition after proposition without benefit of precise citation from documentary sources.

The key General Assembly resolutions of 1965 and 1966 make express reference to the duty of rehabilitation. And the final resolution, General Assembly resolution 2347 (XXII) of 19 December 1967, adopted unanimously, recalled the earlier resolutions 2111 (XX) and 2221 (XXI), both of which had contained strong recommendations with respect to rehabilitation, and noted that Nauru should become independent on 31 January 1968 and resolved:

> "In agreement with the Administering Authority, that the Trusteeship Agreement for the territory of Nauru approved by the General Assembly on 1 November 1947, shall cease to be in force upon the accession of Nauru to independence on 31 January 1968 . . ."

Mr. President, Members of the Court, the Australian thesis amounts to this. The granting of independence took place without the duty of rehabilitation being acknowledged by Australia. The United Nations organs permitted the completion of the independence procedure without obliging Australia to accept the burden of rehabilitation. Therefore, Nauru has waived its claim.

In our submission, there is no evidence to support the Australian assertions concerning waiver. Moreover, the related thesis, that the United Nations organs, as it were, acted as the agents of Australia in the mechanism of waiver, is startling and unattractive.

The position adopted by Australia, in its essentials, involves imposing a choice upon the Nauruan leadership in the period immediately before independence. According to this choice, either Nauru postponed independence until such time as Australia recognized its responsibility, or independence was accepted but only on the condition that the claim concerning rehabilitation was renounced.

This is precisely the scenario adopted by the Agent and Counsel of Australia. But it is a scenario unrelated to the evidence and one which, in our submission, was inherently unlikely to correspond with the intentions of the Trusteeship Council and the General Assembly in the run-up to independence.

NAURUAN AFFIRMATION OF THE CLAIM AFTER INDEPENDENCE

Immediately upon the achievement of independence, the Nauruan claim was affirmed by the President of Nauru, in circumstances referred to in graphic detail by my colleague, Professor Connell. If I could just remind the Court, on 31 January, it is reported in the Australian press that President DeRoburt had said in public:

> "We hold it against Britain, Australia and New Zealand to recognize that it is their responsibility to rehabilitate one-third of the island." (*The Sun* (Sydney), 2 February 1968; Nauru Memorial, Vol. 4, Ann. 69.)

Moreover, the theme of rehabilitation was also the subject of the letter dated 5 December 1968, from the President of Nauru to the Australian Minister of External Affairs (Nauru Memorial, Vol. 4, Ann. 76). The significance of this letter has already been explained by my colleague, Professor Connell.

The fact is that Nauruan conduct in the post-independence period provides confirmation of the claim to rehabilitation and thus of the consistency of the Nauruan position throughout, both before independence and after independence.

However, before I move on to an examination of the post-independence evidence, I shall, with your permission, present my submissions on the question of waiver.

They are as follows:

First: during the key discussions in 1965, 1966 and 1967, Australia tended to avoid any express denial of the claim, relying generally on the assertion that Nauru would have "sufficient funds" at the time of independence, a theme which has been repeated here by the Australian Agent.

Secondly: When the Nauruan position was stated with precisions at the Thirteenth Special Session of the Trusteeship Council, on 22 November 1967, the Australian representative there present made no denial or reservation.

Thirdly: Australia has failed to produce any evidence of an express waiver and relies exclusively on inference.

Fourthly: The inferences which Australia has invited the Court to draw are baseless and are incompatible with the documentary record taken as a whole.

Fifthly: In any case, in our submission Australia has failed to satisfy the standard of proof applicable to the renunciation of rights.

Sixthly: — and lastly — the Court should require, in our submission, special rigour in proof of renunciation when the context involves relations before independence and when the alleged waiver relates to claims concerning breach of Trusteeship obligations.

THE "UNREASONABLE DELAY" ARGUMENT

I now move on to the "unreasonable delay" argument and that leads me on to the post-independence history.

Australia has invoked the concept of extinctive prescription or, in the phrase used in these proceedings, "unreasonable delay" and that argument was developed by my friend Professor Bowett in particular (CR 91/16, pp. 25-29).

In the Nauruan Written Statement (pp. 48-50, paras. 119-23) it is demonstrated that the lapse of time, as a matter of law, the lapse of time *as such* does not bar claims and that some other element, such as prejudice to the Respondent State, is required. In fact, Counsel for Australia appears to accept this view, thus resiling from the position by Australia in the Preliminary Objections of Australia (paras. 381-386).

The position of Nauru is very straightforward. The rehabilitation claim was on record, at least as early as 1965, but was not the subject of agreement and consequently remained unresolved at the time of independence. After independence, the claim was maintained by Nauru but initiatives on the part of Nauru towards a settlement met with a refusal to negotiate.

And so, in our view, the thesis of "unreasonable delay" is, in essence, an attempt to depict the reluctance of Australia to take Nauruan claims seriously as a delay in presentation of the claim on the part of the applicant State. On this view of history — but only on this view of history — the Application of Nauru came as a surprise to Australia.

The first element in the Australian argument is "that no legal claim was ever presented post-independence" (CR 91/16, p. 27) and that the "delay" (in their phrase) of 24 years constitutes an implied waiver (*ibid.*, pp. 25-26).

In our view, the premises of the Australian argument are pleasingly eccentric.

In the first place, if the pre-independence waiver were established, then no post-independence claim could arise, it being common ground between the Parties that independence as such made no difference.

Secondly, an implied waiver can only operate in respect of an actual claim.

Thirdly, Counsel for Australia asserts that "no legal claim was ever presented post-independence".

Leaving aside the contradictions in the Australian argument, the key elements, in our submission, are these. As a matter of law, once notification of a claim has been made, the principle of prescription simply cannot apply. The Australian Government was notified of the claim prior to independence, for example, in the three phases of negotiation in 1965, 1966 and 1967.

And the Australian pleadings have recognized the continuity of the history of the dispute before and after independence, as I pointed out at the outset of my speech yesterday.

Consequently, and given that Nauru has maintained its claim relating to rehabilitation since independence, the notification in the period before independence rules out the operation of the principle of prescription.

In my submission, the relevant legal sources reveal that the principal element in the concept of "undue delay" or "prescription" is delay in the original notification of the claim to the respondent State and once a claim has been notified there must be a very strong presumption against the application of extinctive prescription. This view is supported by Sir Hersch Lauterpacht, Charles Rousseau and other authorities and the relevant citations may be found in our Written Statement (Nauru Written Statement, pp. 50-51, paras. 126-130).

On the basis of the notification of the claim before independence, Australia cannot claim the benefit of prescription.

But Australia argues that, in any event, no legal claim was presented after independence (CR 91/16, pp. 26-28).

This argument has two aspects, of which the first is, as it were, *sub rosa*. The Australian presentation in this context ignores the pre-independence evidence of legal claims which I have already reviewed. And so, this omission allows Australia to insinuate that the post-independence initiatives appear on an empty canvas, when, in reality, they involve the continuation of a long-developed Nauruan stance.

The second aspect of the Australian argument is closely related to the first. It involves the suggestion that, because a document does not anticipate the precise contents of the Application, or otherwise present a precise legal claim, therefore no legal claim has been made. And this is the extremely artificial approach which Counsel for Australia brings to the post-independence history of the dispute (CR 91/16, pp. 26-27).

After all, the context in which the exchanges occurred since independence was that of diplomacy rather than negotiation. No third-party settlement procedure was involved and therefore legal argumentation as such was out of place.

Nonetheless, the Australian responses to Nauruan initiatives post-independence have shown a clear appreciation of the element of continuity with the dealings before independence and have presented what are in substance legalistic grounds for refusing Nauruan requests.

There can be no question that whenever a reference to rehabilitation occurred in a document, the Australian Government and its advisers would be well aware of the legal ramifications and the connected series of antecedents reaching back to the Talks in the years 1964 to 1967.

Thus, although Professor Bowett (CR 91/16, p. 26) belittles the Nauruan letter dated 5 December 1968 (Nauru Memorial, Vol. 4, Ann. 76) the Australian response adopts a formal tone and deploys legal considerations in justification of its conclusions. The key paragraph of the Australian reply, dated 4 February 1969, is as follows:

> "I have consulted the New Zealand and British Governments on your proposal. You will recall that the Partner Governments, in the talks preceeding the termination of the Trusteeship Agreement, did not accept responsibility for the rehabilitation of mined-out phosphate lands. The Partner Governments remain convinced that the terms of the settlement with Your Excellency's Government were sufficiently generous to enable it to meet its needs for rehabilitation and development. In the circumstances, therefore, you will understand that the Partner Governments are not able to agree to your proposal." (Nauru Memorial, Vol. 4, Ann. 77.)

Obviously, from the terms of that letter, an important point of principle was involved, other Governments were consulted, and what was produced was a formal and cautious response to the Nauruan letter of 5 December 1968.

The issue of rehabilitation was raised at the highest level in 1973 and 1974. The sequence of events has been recorded by the then President of Nauru, as follows:

> "On a State Visit to Canberra in 1973, I raised with the then Prime Minister, the Honourable E. G. Whitlam, the question of rehabilitation as a matter of concern. Again, when Senator Willesee, the Acting Minister of Foreign Affairs in the Whitlam Government [in Australia], visited Nauru in 1974, I raised the matter with him but to no avail. A subsequent approach to the Australian Prime Minister, the Honourable R. J. L. Hawke, in 1983, met with a similar response. At that point, my Government, well understanding that primary mining of phosphate was within a few years of completion, decided that an independent study of the rehabilitation problem should be set up and so the Commission of Inquiry was later launched." (Statement of Mr. Hammer DeRoburt, appended to the Nauru Memorial, Appendix 1, para. 30.)

In 1983 the President of Nauru addressed a letter to Mr. Hawke, the Prime Minister of Australia, which read (in part):

> "I thank you very much for sparing me some time from your very busy schedule on the Tuesday, 30th August, at the Lakeside Hotel in Canberra, to enable me to mention two outstanding matters which have been of serious concern to successive Governments of Nauru. As I had undertaken, I am now writing on one of these matters, the rehabilitation of worked-out phosphate lands on Nauru."

And the letter continues

> "Prior to, and at the time of, Nauru's achievement of independence from the Partner Governments of Australia, New Zealand and the United Kingdom, we had requested Australia and the other Governments to rehabilitate that part of the phosphate deposit which has been mined by them for the benefit of their countries. However our requests were rejected by the three Governments, the last occasion being at the General Assembly of the United Nations in December 1967."

And he completes the letter

> "My Government, acting out of necessity and in pursuance of a formal resolution made during the First Parliament (1968-1971) of Nauru, has now decided to approach the present Government of Australia to seek a sympathetic reconsideration of Nauru's position in this matter." (Nauru Memorial, Vol. 4, Ann. 78.)

And in our submission the terms of that letter of 1983 convey very clearly the continuity in the history of the dispute, and the contents of successive letters show that this element of continuity was perceived on both sides.

And then we come to the letter dated 14 March 1984 in which Mr. Hawke replies to the President of Nauru writing in 1983. And Mr. Hawke says:

> "Thank you for your letter of 6 October 1983 requesting reconsideration of the proposal that the Australian Government, along with the former partner governments of New Zealand and the United Kingdom, contribute to the cost of rehabilitating areas on Nauru that have been subjected to phosphate mining.
>
> After careful consideration of your request, in consultation with my Ministers concerned, I wish to inform you that Australia stands by the position it took in 1967 when together with New Zealand and the United Kingdom it rejected a similar request for rehabilitation assistance. The former partner governments agreed at that time that it was a requirement of termination of the trusteeship agreement that they were entirely cleared of any onus or financial responsibility for the rehabilitation of Nauru."

And Mr. Hawke continues

> "This position was reaffirmed early in 1969 by the then Minister of External Affairs who, in response to a similar proposal, emphasised that the partner governments remained convinced that the terms of the settlement with the Government of Nauru were sufficiently generous to enable it to meet its needs for rehabilitation and development.
>
> I regret, therefore, that Australia sees no reason to vary its position on this matter." (Nauru Memorial, Vol. 4, Ann. 79.)

And so, Mr. President, in the opinion of Nauru this letter of 1984 gives a true picture of the attitude of the respondent State. The Australian Government refuses to recognize its responsibility and accepts that this traditional refusal dates back to 1967.

No surprise is expressed; and no complaint of delay in raising the question. Mr. Hawke is accepting that the question is one of long-standing.

In other words the subject of the correspondence is clearly a dispute going back to the pre-independence period.

There is one last point on this. Australia accepts that, if there was a waiver, it is irrelevant whether or not Australia was prejudiced (CR 91/16, p. 28). However, it is contended also that Australia was in fact prejudiced by the alleged delay.

The first element of prejudice asserted by Professor Bowett is that Australia did not have all the documents apparently because "the present claim of Nauru takes us back to the days of the Mandate".

With respect this complaint has a very hollow ring. Both Parties had access to the British archives and Australia has its own archives of that period.

However, the Agent of Australia expressed a very different view in his opening speech where he said:

> "At this stage we say that it is clear that it cannot be argued that the Court lacks the necessary evidence, or proof of facts, to be able to rule on Australia's objections at this stage. Australia has set out the factual and legal basis of its objections in some detail. It has also provided the relevant documentary evidence. All the relevant facts are before the Court. They are either admitted by Nauru, or in the public domain, or evidenced by documentary material already before the Court." (CR 91/15, pp. 23-24.)

The second element of alleged prejudice invoked by Professor Bowett is that Australia is being sued alone (CR 91/16, pp. 28-29).

In the view of Nauru this is the consequence of a perfectly proper choice based upon legal considerations which will be expounded by my colleague, Professor Crawford. The question of parties has no relation to the issue of delay.

Mr. President, Members of the Court, the element of prejudice envisaged in the legal sources is precisely related to the difficulties of proof in the context of stale claims.

The doctrine of prescription or delay requires the existence of some procedural disadvantage suffered by the respondent State. Apart from the question of notification, the only other issue of procedural fairness tends to concern the availability of evidence to allow the Respondent adequate means of defence.

Australia was notified of Nauruan claims at least as early as 1965 and the Agent has accepted that Australia has not been disadvantaged in respect of matters of proof.

The relevant legal sources have been set out in the Nauruan Written Statement, pages 50-52, paragraphs 126-133.

I have now completed the argument on delay and will present my submissions on that subject.

First: The element of lapse of time in the history of the dispute results exclusively from Australia's refusal to take Nauruan legal claims seriously.

Secondly: Australia was notified of Nauruan claims no later than 1965 and has suffered no procedural disadvantage whatsoever.

Thirdly and lastly: The diplomatic correspondence since independence confirms that there has been no element of the unexpected in the relations of Nauru and Australia.

RECOURSE TO SOME OTHER METHOD OF PEACEFUL SETTLEMENT

My next task, Mr. President, is to address the exclusion clause in Australia's declaration which refers to "any dispute in regard to which the parties thereto have agreed to have recourse to some other method of peaceful settlement".

In the Preliminary Objections (paras. 278-283) Australia postulates an agreement by Nauru "to the settlement of disputes between it and the Administering Authority . . . by direct negotiation" (see para. 283, in particular).

Also in the Preliminary Objections (paras. 284-291) Nauru is alleged to have "agreed to accept as settled all outstanding issues with the Administering Authority by resolution of the Trusteeship Council and General Assembly, as the final method of settlement" (see para. 284, in particular).

In his oral argument on behalf of Australia Professor Jiménez de Aréchaga produced a much more complex hypothesis. And with your permission, Mr. President, I would like to remind the Court of how complex that hypothesis is. Professor Jiménez de Aréchaga said:

> "We shall try to demonstrate that the means of peaceful settlement agreed upon and utilized by the Parties, in respect of the dispute, were not simply direct negotiations but included as well certain methods of peaceful settlement resulting from the complex mechanism established by the United Nations Charter for the supervision of a trusteeship administration."

And he continues

> "The exercise, during 20 years (between 1947 and 1968), of these various other methods of pacific solution, and the interaction between them, did result in the settlement of all the facets of the dispute which Nauru now brings before the Court.
>
> Through the exercise of the United Nations functions of supervision of a trusteeship administration, several traditional methods of peaceful settlement of disputes were brought into play. The process comprehended an amalgam of elements of investigation, inquiry, mediation and conciliation, together with negotiations, conducted not directly between the parties but under the aegis and under the control of the competent United Nations organs.
>
> The Trusteeship system of supervision established by the Charter embraced those traditional methods and, in so doing, it became a specific method on its own, 'the method of the Charter', exercised through the normal processes of the Trusteeship system and specially designed to examine in a contentious way and to solve new kinds of disputes, not between States, but arising between the Administering Authority and the indigenous inhabitants, the people whose rights were preserved by Article 80 of the Charter." (CR 91/15, pp. 44-45.)

This is complex indeed, and represents a considerable restructuring of the argument as originally presented in the Preliminary Objections of Australia.

The Preliminary Objections of Australia proposes two agreements for present purposes. Professor Jiménez de Aréchaga in the oral hearings now proposes a single agreement.

All these three alleged agreements in our submission remain pure historical hypotheses unmatched by any evidence.

The Preliminary Objections of Australia itself provides no single item of documentary evidence to support the thesis that the Nauruans had agreed to settle claims by direct negotiation. The Australian Government invokes recommendations by United Nations organs (paras. 278-279) none of which refer to an agreement. In addition, there is reference to the fact that negotiations took place and resulted in the Canberra Agreement of 1967 (paras. 280-283).

But no document is cited to support the thesis of an agreement to negotiate.

The second agreement alleged in the Preliminary Objections of Australia is to the effect that at the termination of the Trusteeship, Nauru agreed to the settlement of all issues by resolution of the Trusteeship Council and General Assembly. In the relevant paragraphs of the Australian Written Pleading (paras. 284-291) no single document is cited to embellish what constitutes essentially a piece of imagination.

And so we are left with the third proposal of a possible agreement in the oral argument of Professor Jiménez de Aréchaga.

With respect to a distinguished colleague the diverse considerations he invokes do not involve the production of evidence that any agreement was ever concluded.

First of all, the agreement could only have been tacit since no written text is indicated or document cited.

Secondly, the agreement, if it existed assumed a power on the part of the United Nations organs the existence of which is problematical.

But none of the elements invoked provides proof of an agreement to have recourse to enquiry, mediation and conciliation whether through the mechanism of the Trusteeship Council or otherwise.

Mr. President, the creation of a mandate of peaceful settlements of that type, delegated to one or more organs, would surely have left some traces in the records of the United Nations.

Moreover, the Trusteeship system, with its Visiting Missions, was designed as a monitoring and supervision apparatus. To see the process as a mechanism for the settlement of legal disputes is nothing less than whimsical.

And in general the Australian thesis in this respect leaves many questions unanswered.

Why do the resolutions of the Trusteeship Council and the General Assembly make no reference to the process of dispute settlement, the procedures of mediation and conciliation and so forth?

Why do the consideranda of the resolutions make no reference to Article 33 of the Charter?

Why do the resolutions make no reference to the settlement of the various issues invoked by Australia?

The text of the most relevant Trusteeship Council resolution, resolution 2149 (S-XIII), provides no support for the extravagant constructions of Counsel for Australia. The resolution, in its operative part, reads as follows:

> "*The Trusteeship Council,*
>
> 1. Notes the formal announcement by the Administering Authority that, following the resumed talks between representatives of the Nauruan people and of the Administering Authority, it has been agreed that Nauru should accede to independence on 31 January 1968;
>
> 2. Welcomes by statements made in the Trusteeship Council by representatives of the Governments of Australia, New Zealand and the United Kingdom of Great Britain and Northern Ireland as the Administering Authority, and by the representatives of the Nauruan people, that the Administering Authority has agreed to meet the request of the representatives of the Nauruan people for full and unqualified independence;
>
> 3. Recommends that the General Assembly at its twenty-second session resolve, in agreement with the Administering Authority, that the Trusteeship Agreement for the Territory of Nauru approved by the General Assembly on 1 November 1947 shall cease to be in force upon the accession of Nauru to independence on 31 January 1968.
>
> 1323rd meeting,
> 22 November 1967."

Mr. President, there are three further considerations of fact which militate against drawing any inference in favour of the Australian interpretation of the history.

The first is the sheer complexity of the structure proposed by Professor Jiménez de Aréchaga.

The second consideration of fact is the conduct of Australia after the independence of Nauru. Australian responses to Nauruan initiatives may refer to the 1967 Agreement or they may refer to the termination of the Trusteeship. But they contain no references to a process of dispute settlements involving organs of the United Nations.

Thirdly, there is a temporal element which Australia has ignored. Until, quite late in the day, it became clear to the Nauruans that Australia would not recognize the responsibility concerning rehabilitation, there was in fact no mature dispute to be submitted to one of the "traditional methods of peaceful settlement of disputes" referred to by Professor Jiménez de Aréchaga (CR 91/15, pp. 44-45).

By the time the Phosphate Industry Agreement was concluded, there was little the Nauruans could do except to reserve their rights with respect to breaches to the Trusteeship Agreement and this, in our submission, they did.

In the final run-up to independence the action of the United Nations organs in relation to the rehabilitation claim conditioned its existence but did not resolve the issue.

Mr. President, Members of the Court, in concluding my arguments on this "other methods of settlement" proviso, I must comment on the audacious approach to questions of evidence adopted by the respondent State in these proceedings.

I am referring to the arguments in the alternative offered by Australia which involve totally incompatible factual assertions.

Thus it has been argued that no legal claim relating to breach of the Trusteeship was ever made (Professor Bowett, CR 91/15, pp. 74-80). And so Professor Bowett stated "There was no express allegation of breach, and no finding of breach by any United Nations body." (CR 91/15, p. 79.)

On the other hand it has been argued by Professor Jiménez de Aréchaga that the action of the United Nations organs "did result in the settlement of all the facets of the dispute which Nauru now brings before the Court" (CR 91/15, p. 44; and generally at pp. 44-69).

This reliance upon widely divergent theses of fact confirms the view that the inferences which Australia is asking the Court to draw are simply unrelated to the documentary evidence and to the real history of the dispute.

And so our submission is that there is no basis for the application of the proviso in Australia'a Declaration accepting the Court's jurisdiction and there is no impediment to the exercise of jurisdiction.

In approaching the end of my presentation I need to deal with a quite different question.

THE NATURE OF THE NAURUAN CLAIM

In his speech last Monday my friend Professor Bowett raised certain questions concerning the nature of the Nauruan claim. He said:

> "Essentially, it is the claim that Australia was in breach of the Trusteeship Agreement by failing to rehabilitate the island prior to 1967. Nauru cites specifically breaches of Article 76 of the Charter, and Articles 3 and 5 of the Trusteeship Agreement in the first of its submissions . . .
>
> So, we are not concerned with the obligations which the Administering Powers assumed towards the United Nations as such — obligations of report, supervision and control — or obligations owed to Member States generally; we are concerned only with obligations owed to the people of Nauru under a system of administration controlled and supervised by the United Nations.
>
> Nor are we really concerned with obligations outside the Trusteeship Agreement. It is true that Nauru in its submissions seeks to invoke obligations of international law outside the Trusteeship Agreement. But, as the Court well knows, there are real difficulties in assuming that apart from the Treaty, international obligations were owed to non-State entities such as the people of Nauru prior to independence." (CR 91/15, p. 72.)

These remarks raised two connected questions which I must now address.

The first question concerns the essential continuity of the history of the dispute since before independence. In the Preliminary Objections of Australia, Australia clearly accepts this continuity.

And passages in the Preliminary Objections of Australia which confirm the Australian position on continuity include the following:

> "289. According to the Australian declaration accepting the jurisdiction of the Court it is necessary that the parties to the dispute have agreed to have recourse to 'some other method of settlement'. In this case, the Nauruan agreement to the method of settlement involving the Trusteeship Council and the General Assembly results from the fact that the representatives of the Nauruan people, freely and of their own accord, participated in the debates of the Trusteeship Council and of the Fourth Committee of the General Assembly, accepted these fora for their claims, raising and discussing the very questions which are now the subject-matter of the dispute brought to the Court. These representatives consented to and did not oppose resolution 2347 (XXII). All this constituted agreement by conduct.
>
> 290. The Republic of Nauru bases its case on being entitled to invoke the actions and statements of the representatives of the Nauruan people, before independence. Clearly, they must also be bound by their actions and statements at that time.
>
> 291. Nor can Nauru be heard to say that it was not in a position to participate fully as an independent nation in the United Nations consideration of the issues raised by its claim. It was a third party beneficiary of the trusteeship system and must, therefore, be bound by and taken to have agreed to the method of settlement provided for through the United Nations organs."
>
> "377. . . . Unlike the Nauruan claims in relation to the performance of the Trusteeship Agreement, in relation to which Australia concedes that Nauru has a legal interest, there is no similar basis for a claim to the 1987 assets."
>
> "391. Even if the 1983 letter represents a relevant raising of the Nauruan claims it is still 16 years after agreement was reached on independence and the termination of the Trusteeship and, more particularly, on the terms of the settlement of all the phosphate industry issues. This in Australia's view is a delay that is fatal to the present Nauruan claim."

So much for the Preliminary Objections. And this important element of continuity has also been recognized by Counsel during the oral argument: I refer, for example, to the speech of Professor Jiménez de Aréchaga (CR 91/15, p. 48).

In the submission of Nauru, the consequence is that Australia has waived any question of admissibility relating to the fact that the elements of the dispute arose before independence.

Both parties have recognized this continuity. No doubt — we are respectfully aware of this — the Court has an inherent power to address issues *proprio motu*. However, in the submission of Nauru, particularly in the context of admissibility of claims, it is perhaps inappropriate to exercise such a power unless important considerations of international public order so require.

In the present proceedings, it is impossible to discern considerations of public order of a type which would militate against the admissibility of Nauruan claims on the basis simply that they arose before independence.

It is also worth noting that the Australian recognition of the formal and procedural validity of the claims of Nauru since before independence may be said to provide an answer to those who suggest that success on the Merits in this case would precipitate an unacceptably high number of claims from other applicant States.

I must also revert briefly to Professor Bowett's contention that the dispute is not concerned with obligations apart from the Trusteeship Agreement and, in particular, the bases of claim related to general international law.

Nauru, of course, reserves its position on the precise legal bases of its claim. What, in our submission, is significant for present purposes is the recognition by Australia of continuity in the history of the dispute before and after independence. The justification in a procedural and evidential sense of the causes of action by means of which an Applicant State articulates its claim is obviously not a question of a preliminary character.

Mr. President, that concludes my first speech and I would, with great pleasure, ask you to give the floor to Professor Crawford.

ARGUMENT OF MR. CRAWFORD

COUNSEL FOR THE GOVERNMENT OF NAURU

Professor CRAWFORD:

INTRODUCTION

Mr. President, Members of this Honourable Court. This is the first time I have appeared before this Court. May I say how much of an honour it is to do so.

1. These remarks will be addressed to the Australian argument that the termination of the Trusteeship by the United Nations prevents Nauru from bringing its claims now, or the Court from hearing them.

Professor Bowett put this termination argument in a number of ways. He said that the Trusteeship Council and the General Assembly had *exclusive* authority to determine issues relating to the Trusteeship Agreement. Since their authority was exclusive, it would follow that the Court has no authority. Secondly, and alternatively, he argued that the termination of the Trusteeship Agreement necessarily settled all legal issues relating to the Trusteeship obligations. Thirdly, and again alternatively, he asserted that the General Assembly *did* in fact resolve Nauru's claim, and resolved it adversely to the Nauruan people. He did not suggest that there was any express decision by the General Assembly that Nauru had no rights with respect to the rehabilitation of its lands. But he argued that such a decision was to be implied from the terms of General Assembly resolution 2347 (XXII). And finally, he argued that because the Nauruans failed to obtain an express decision from the General Assembly in their favour, the termination of the Trusteeship Agreement terminated their claim. According to this argument, an express positive decision in Nauru's favour, and nothing less than that, was required.

PRELIMINARY COMMENTS

Before dealing with these alternative forms of the termination argument, a few preliminary comments are called for.

2. The first of these concerns the relationship between the Trusteeship Agreement and general international law. Counsel for Australia was dismissive of the idea that general international law has any role to play in this case. He suggested that the Trusteeship Agreement had come along and supplanted general international law, imposing order and precision on what had previously been vague and imprecise standards of general international law, standards lacking cogency or rigour (CR 91/15, pp. 72-73).

But this is to invert the order of issues, and to subvert what this Court said in its key pronouncement in the *Namibia* Opinion. The Court stressed there that the legal instruments "cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law" (*I.C.J. Reports 1971*, p. 3, at p. 31). There, of course, the Court was discussing a mandated territory, but the same evolutionary principle must apply to a trust territory. And that approach has been applied by the Court subsequently, for example in the *Western Sahara* case (*I.C.J. Reports 1975*, p. 12), which concerned the application of the principle of self-determination under Chapter XI of the Charter. I would refer also to what the Court said as to the relationship between general international law and treaty obligations in the *Nicaragua* case (*I.C.J. Reports 1988*, p. 14).

Consistently with this approach, general international law has a significant role to play, for example — and I give only one example — in helping determine where the balance is to be struck in cases where it is said that the rights or interests of an administering power conflict with the rights or interests of the people who were the beneficiary of the trust.

3. Now a second preliminary point. Counsel for Australia, Professor Bowett, stressed the scope of the General Assembly's power to determine legal issues arising under a trusteeship agreement. That the General Assembly has dispositive power in some cases is clear from the *Namibia* Opinion — and we certainly accept that. But Counsel seemed to say that the General Assembly could determine authoritatively (as against an Administering Authority or a dependent people) any legal issue arising from a trusteeship agreement. Not even the *Namibia* case goes that far, since that case was only concerned with the authority of the General Assembly pursuant to a repudiation by the Administering Authority of the very conditions which gave it title to remain in the territory.

The scope of the power which Counsel for Australia attributed to the General Assembly was at least partly a function of the view that the Assembly's authority over legal disputes relating to trust territories was actually exclusive. If you have an exclusive power over something, presumably it is also a comprehensive power. But it cannot be right that the General Assembly's power is exclusive and the fact that it is not right — I shall argue that shortly — casts doubt about the related Australian position on the question of the scope of the power of the General Assembly.

For the purposes of the present case, it is not necessary to go into much detail on these issues. Nauru's primary argument is that the General Assembly was not asked to resolve the present dispute by either Nauru or Australia, and that it did not do so. That it did not settle the dispute expressly Australia concedes. I argue below that it did not do so impliedly or by necessary operation of law either.

Since that is the case, I would simply record Nauru's view on the question of competence, which is that the General Assembly's power to settle or resolve legal disputes arising in relation to trust territories is limited to the settlement of disputes either expressly referred to it by the parties, or to the resolution of legal issues necessarily arising in the course of such functions as the termination or revocation of trusteeship agreements. The present dispute, in the Nauruan submission, fell within neither of these categories.

4. My third preliminary observation relates to the question whether the issue of termination possesses in the circumstances "an exclusively preliminary character". As the Nauruan Agent has already stressed, that is not a question that can be answered generically or categorically, in the context of all conceivable arguments that the rehabilitation obligation has somehow come to an end. The question must be why is it said that the obligation has been terminated? If there is some simple and general legal proposition, unrelated to the facts of the given case, which determines that the claim must fail, then so be it. For example, if it is the case that no legal obligations can ever survive termination of a trusteeship in any circumstances, then nothing further remains to be said. Nauru, of course, argues that that is not the case. If this Nauruan argument is accepted, then the position becomes much more complex. Australia does not suggest that the General Assembly expressly terminated or decided the Nauru rehabilitation claim.

And it follows from that that the legal consequences of the relevant General Assembly resolutions, and especially of resolution 2347 (XXII), can only be decided on after a full analysis of the circumstances leading to independence, of the Nauruan and Australian positions on the various issues in dispute, and of the negotiations which preceded independence — negotiations which, as Australia concedes in the Preliminary Objections (Preliminary Objections of Australia, paras. 278 ff.), were capable of having continuing legal consequences. The legal consequences of resolution 2347 (XXII) are accordingly bound up with the whole complex of transactions which arose in the crucial pre-independence period and which are central to the Nauruan claim on the merits.

In these circumstances, Mr. President, the issue of the legal consequences of General Assembly resolution 2347 (XXII) should not be subjected to a summary resolution by the Court of the kind sought by Australia. It is, therefore, submitted that the question does not possess, in the circumstances, an exclusively preliminary character.

THE ALLEGEDLY EXCLUSIVE AUTHORITY OF THE POLITICAL ORGANS OF THE UNITED NATIONS

5. Having disposed of these preliminary matters, let me turn to the first of the arguments made by Australia in support of the view that the termination of the Trusteeship terminated the claim. This was the argument that the General Assembly and the Trusteeship Council were the only organs competent to determine the issue of breach — that they were exclusively competent. Obviously, if this were so, the Court could not make its own independent finding, in this or, indeed, in any case concerning a trust territory.

6. It should be noted that Australia accepts (Preliminary Objections of Australia, paras. 217-218) that the obligations arising under the Trusteeship Agreement and under related rules are legal and not merely political or moral obligations. It also accepts that those obligations were justiciable. The spectre of non-justiciability underlay the second *South West Africa* cases: one cannot have legal obligations or legal rights in relation to something that is exclusively political. Australia does not go so far.

But the non-justiciability of the Trusteeship obligation having been dismissed by the front door, comes in through the back door in a more subtle guise. To say that only political organs can determine an issue is very like saying that it is not a legal issue. According to Australian arguments, the political organs had *exclusive* authority to decide the issue of breach of the Trusteeship Agreement, and therefore this Court's competence to do so is excluded, at least unless and until the General Assembly authorizes it to act, for example, by requesting an advisory opinion. Far from being an agency of co-ordinate authority within the United Nations system, the Australian argument reduces the Court to a subordinate role — a role hardly consistent with its position as the "principal judicial organ of the United Nations".

7. What is the basis for this so-called exclusive authority of the political organs of the United Nations, on which Australia relies? Well, one reason given by Professor Bowett was that the Court was not competent to deal with the issue before 1968 because there was no compromissory clause in the Trusteeship Agreement and because the Court was never asked to give an advisory opinion on Nauru. The argument seems to be that a political organ has legal authority, and not only that but *exclusive* legal authority, on any issue over which no international court or tribunal has jurisdiction.

8. The principle, Mr. President, has only to be stated to be rejected. That principle would mean that international organizations have extensive areas of exclusive legal authority, since the truth is that international courts do not have general jurisdiction over the legality of the acts of international organizations.

The true position is that, as a matter of general principle, international law exists independently of the jurisdiction of courts to apply it in a given case. And this is as true where international organizations are limited by or subject to international law, as it is in any other situation. The Australian argument equates the absence of jurisdiction of international tribunals with the exclusive competence of political organs. But, if that was so, how could the Court ever deal, in the absence of jurisdiction conferred after the event, with the legality of the acts of an international organization?

9. The exclusive competence of the political organs of the United Nations to determine legal questions is not to be presumed. Not even the Security Council's "primary authority" over matters of international peace and security excludes the jurisdiction of this Court to determine legal issues relating to the use of force, as the Court made abundantly clear in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility* (*I.C.J. Reports 1984*, p. 392, at pp. 431-436); *ibid., Merits* (*I.C.J. Reports 1986*, p. 14 at p. 26). This must be the position *a fortiori*, with Chapters XII and XIII of the Charter, neither of which confer "primary", let alone exclusive, authority on the Trusteeship Council or the General Assembly.

10. The argument that the General Assembly and the Trusteeship Council had exclusive jurisdiction over the issue is also inconsistent with the Court's approach to these matters, as the *Namibia* Opinion shows (*I.C.J. Reports 1971*, p. 6, at pp. 45, 47, 50, 52). In the *Namibia* Opinion the Court had a splendid opportunity to fail to grasp the nettle of the legality of General Assembly acts, in fact it addressed precisely that question. The Court has frequently dealt with legal issues arising from mandated, trust and non-self-governing territories, even where those issues involved politically charged controversies which were under consideration by other United Nations bodies.

11. Australia does accept that there are exceptions to the "exclusive jurisdiction" of the political organs: in particular the jurisdictional clauses in some trusteeship agreements, and the possibility of advisory opinions being sought on legal issues arising in relation to trust territories (CR 91/15, p. 74). But these exceptions threaten Australia's major proposition of exclusive power.

12. For example, the Court has never accepted that the legal position of a mandate or a trust territory which lacks a jurisdictional clause (and that was true, for example, of the South West Africa Mandate) was any different from the legal position of a mandate or a trust territory with a jurisdictional clause. Nauru in fact had one during the League of Nations period and did not have one during the United Nations period. In particular, it has never been suggested, and certainly not suggested by the Court, that the basic rights of the people of a territory were any different depending on whether a jurisdictional clause existed. And as to advisory opinions, it cannot be the case that a dispute becomes subject to law *because* an advisory opinion is requested with respect to that dispute.

13. For these reasons, Nauru submits that the political organs of the United Nations did not have exclusive power over Trusteeship issues, and that this Court retains with respect to such territories the power to determine legal issues arising before it.

THE EFFECTS OF TERMINATION OF THE TRUSTEESHIP

14. I turn now to the second Australian argument, which was that the termination of the Trusteeship Agreement necessarily settled all legal issues relating to the Trusteeship obligations. Although Professor Bowett did not spend much time dealing with it, obviously the leading authority here is the decision of the Court in the *Northern Cameroons* case (*I.C.J. Reports 1963*, p. 15). Before dealing with that case in some detail, I should first refer to the general legal principles applicable to the survival of rights which have accrued under international law or under a treaty.

15. It has long been recognized that a trusteeship agreement has two aspects, the aspect of a treaty and the aspect of a régime for the administration of territory in the interests of the people of the territory.

If the relevant category for the purposes of the survival of rights is the category of treaties, then the general principle is that the termination of a treaty does not terminate rights acquired under it. That is to say, rights already acquired. This was what the Court held in the First Phase of the *South West Africa* cases (*I.C.J. Reports 1962*, p. 319).

On the other hand, if the relevant category for the purposes of the survival of rights is the category of trusteeship régimes, then the general principle is that rights acquired under such a régime survive the dissolution of the treaty which created it, if that is necessary in order to protect the interests of the beneficiary. The *Status of South West Africa* Opinion (*I.C.J. Reports 1950*, p. 128) is a clear application of that principle.

On either basis, then, on the basis of a treaty or on the basis of a régime, any right or legitimate claim of the people of Nauru under Trusteeship must be presumed to have survived the termination of the Trusteeship Agreement. Such a right or claim could have been extinguished only (1) if it was duly terminated by a competent authority, or (2) if the termination was the necessary consequence of acts lawfully performed by such an authority.

16. Against this background, which I submit is the relevant background of principle, I turn to the *Northern Cameroons* case. That case involved a claim by the Republic of Cameroon under the jurisdictional clause in the Trusteeship Agreement.

I hope I will be forgiven, Mr. President, and I hope I may be forgiven for using an expression as well for teaching grandparents to suck eggs, but I think the facts of the *Northern Cameroons* case are such that a brief description of them is called for. The Republic of Cameroon claimed that an administrative union between one part of the Northern Cameroons trust territory and a province of what was then the protectorate of Nigeria; that administrative union was in breach of the Trusteeship Agreement. The inference behind the Republic's trying, presumably, was that the administrative union predisposed the people of that part of the trust territory to vote, at a United Nations supervised plebiscite, for union with Nigeria rather than with the Republic of Cameroon. However the Republic of Cameroon did not seek to invalidate the General Assembly's decision confirming the result of the plebiscite. It simply sought a declaration of the legality of the administrative union, a declaration which, if accepted, could have no further legal consequences. The Court, by ten votes to five refused to consider the merits of the claim.

17. It must be stressed that the Court in that case did not decide that all legal claims arising from a Trusteeship Agreement were terminated, by operation of law, on the termination of the Agreement. The General Assembly had been concerned with a specific situation, clearly presented for its decision. That situation

directly concerned the future of the people of the Trust Territory, and in particular the validity of the plebiscites that had been held. As the Court said, "the termination of the Trusteeship Agreement was a legal effect of the conclusions in paragraphs 2 and 3 of resolution 1608 (XV)" (*I.C.J. Reports 1963*, p. 15 at p. 32). I should add that paragraphs 2 and 3 were the paragraphs which directly addressed the issues of the time.

The Court noted that the Republic of Cameroon had raised its plea of nullity of the plebiscites before the General Assembly. With complete justification it construed paragraphs 2 and 3 of resolution 1608 as a specific rejection of that plea. The Court's holding on termination of the Trusteeship was confined to that issue.

18. By contrast, in the present case, at the suggestion of the Nauruan representative and without any demur from Australia, the competent United Nations organs refrained from dealing with the rehabilitation issue, and treated that issue as distinct from the question of independence and termination of the Trusteeship. Counsel for Nauru have already demonstrated that this was so, in his treatment of the waiver issue, and I refer to what was said then.

19. It is true that the Court in the *Northern Cameroons* case did state that rights and privileges granted to other United Nations Members or their nationals came to an end with the termination of the trusteeship (*ibid.*, p. 15 at p. 34). But that comment related only to the exercise of those rights *subsequent* to termination. And that was obvious, since the rights were only conferred for the duration of the trusteeship. The Court did not need to decide whether the right to claim reparation for breaches of the rights to other United Nations Members or to their nationals prior to termination would have survived. It was a different situation and it did not need to decide that question. It were funny that both Judge Wellington Koo and Judge Fitzmaurice thought that, had such rights existed under the Trusteeship Agreement, they would have survived its termination (*ibid.*, at pp. 55, 120). The Court itself expressly left the issue open (*ibid.*, at p. 35).

Nor was the Court concerned with the question whether a right or claim already vested in the people of the Trust Territory would have survived the termination of the Trusteeship Agreement. In the circumstances this was not surprising, since the people concerned had elected to become part of another State and would therefore lack any separate legal personality as a basis for bringing a post-independence claim.

20. The Court also expressed the view that

> "the Republic of Cameroon would not have had a right after 1 June 1961, when the Trusteeship Agreement was terminated and the Trust itself came to an end, to ask the Court to adjudicate upon questions affecting the rights of the inhabitants of the former Trust Territory and the general interest in the successful functioning of the Trusteeship System" (*I.C.J. Reports 1963*, p. 15 at p. 36).

But again this was not because of any general rule that "all legal issues" arising from the Trust were necessarily terminated, but because any right of the applicant State and the applicant State was relying on a compromissory clause under the Trusteeship Agreement, but because any right of the applicant State to bring proceedings was part of the "system of protection" established by the Agreement and by Chapter XII and XIII of the Charter. The right on which the Republic of Cameroon relied was not a personal or individual right. It had no right that the people of the Trust Territory should vote one way or another. The right it relied on related to the "general interest", as Judge Wellington Koo stressed

(*I.C.J. Reports 1963*, p. 15, at pp. 46, 55). That right terminated with the termination of the other aspects of the system of supervision.

21. By contrast the rights of the people of the territory concerned were the very object and purpose of the system — the "sacred trust of civilization" — and not merely an aspect of its supervision. As the Court held in 1950 in the *South West Africa* Opinion (*I.C.J. Reports 1950*, p. 128), there was no reason why those substantive and personal rights of the people of the territory should be regarded as terminated with the termination of the system of supervision of the members. This would only occur if (as in the *Northern Cameroons* case) the people who were the beneficiaries had themselves elected to abandon any separate status and identity — in which case the right would terminate because the bearer of the right ceased to exist. Or it would occur if the right was expressly terminated by a competent authority.

If I may summarize the position, then, the effect of the General Assembly resolution extended only to the legal questions necessarily inherent in the termination of the trusteeship, or actually raised for decision in that connection. The present legal claim of the Republic of Nauru falls into neither of these categories.

It is true, and Australia lays considerable stress on the fact (CR 91/16, p. 9), that Judge Wellington Koo in the *Northern Cameroons* case did adopt a broader view than this. His view was that "all legal issues" involving the people who were the beneficiary of the trusteeship were resolved by operation of law when the trusteeship agreement was terminated. But this view was not adopted by the Court. Judge Wellington Koo himself described his decision as reached "generally by a different line of reasoning" (*I.C.J. Reports 1963*, p. 15 at p. 41). Moreover he never confronted a central difficulty with his reasoning, which is this: that on his view the rights of third States and their nationals to claim in relation to the Trusteeship Agreement would have survived termination, but not the rights of the beneficiary people themselves which was the point of the Trusteeship Agreement.

22. Mr. President, the present case differs from the *Northern Cameroons* case in no less than four important ways, and each of these differences supports the Nauruan argument that the rehabilitation claim survived the termination of the trusteeship.

First, in the *Northern Cameroons* case, the question before the Court had to be resolved by the General Assembly before the termination of the Agreement. The necessary result of the General Assembly's decision was the creation of a territorial right in a third State, Nigeria. That decision was irreversible. And in addition the decision had the necessary effect of extinguishing the legal entity, the people of the Trust Territory, in whom the primary Trusteeship right was vested. That people having ceased to exist, any rights vested in them also ceased to exist. Neither of these problems arose in the present case.

The second difference is that, in the *Northern Cameroons* case, the issue of the terms and outcome of the plebiscite held in the Northern Cameroons was squarely before the General Assembly, and was the principal focus of its resolution 1608 (XV). The Republic of Cameroon had expressly raised this issue before the General Assembly, as the Court noted (*I.C.J. Reports 1963*, p. 15 at p. 32), and its arguments had been expressly rejected. By contrast, the Nauruan representative expressly stated before the United Nations in 1967 that the issue of rehabilitation was not a matter "relevant to the termination of the Trusteeship Agreement", I am quoting those famous words, "nor did the Nauruans wish to make it a matter for United Nations discussion". Clearly enough, what he meant — and I will not labour a point that counsel before me have made — was that it was a separate issue to be taken up after independence — as in fact it was (see Nauru Memorial, paras. 603-612, especially para. 609, for the relevant passages from the debates).

The third point of difference relates to the legal consequences of a decision by the Court here, as compared with the *Northern Cameroons* case. In that case the Court did not deny that the issue presented before it, the issue of the legality of the administrative union, involved a legal question, which would normally have been within its jurisdiction to decide (Professor Bowett of course would deny that, but the Court did not deny it). The problem for the Court was that, as between the parties, no remedy of any kind — that is to say, no relief which it was in the power of the parties to give or of the Court to require — could be awarded. The Republic of Cameroon did not claim that there was anything the United Kingdom could do to give effect to a judgment of the Court, whether by the payment of reparation or any other act. Accordingly, the issue before the Court was "remote from reality" (*I.C.J. Reports 1963*, p. 33). The Court could not render "a judgment capable of effective application" (*ibid.*), one capable of affecting "existing legal rights or obligations" (p. 34). But the position is quite different here. In the present case Nauru does not seek to redefine its political or territorial status. Satisfaction of the Nauruan claim is not a matter "remote from reality". On the contrary, the mined-out land is a pressing reality. Unlike its position in the *Northern Cameroons* case, the Court here is in a position to render a judgment capable of effective application, capable of affecting existing rights and obligations. Indeed it is precisely such a judgment that Australia seeks to avoid!

Fourthly, the present case, and this is the fourth difference, the present case involves a claim by the beneficiary of a trust territory, rather than a State with an indirect interest of a political or economic kind. In the *Northern Cameroons* case, as the Court pointed out, it had not been asked to review the General Assembly's conclusion that the plebiscite was a valid expression of the people's views. It followed, in the Court's words, that

> "a decision by the Court . . . that the Administering Authority had violated the Trusteeship Agreement, would not establish a causal connection between the violation and the result of the plebiscite" (*I.C.J. Reports 1963*, p. 15 at pp. 32-33).

In other words, whatever its indirect effects may have been, any violation of the Trusteeship did not derogate from the exercise of self-determination by the people concerned and that was the main thing. By contrast the present claim can be seen as a further consequence of the Nauruan people's right to self-determination, just as its survival after the termination of the Trusteeship was a consequence of the expressed wish of the Nauruan representatives to leave the question to be resolved separately.

23. In its Written Statement (para. 227) Nauru pointed out that if there was an automatic termination of all legal claims by operation of law, the possibility of claims by an independent Namibia arising out of the former South African administration would be excluded. It also noted the widespread recognition (including by the General Assembly and the Security Council) that those claims survived and would enure to the benefit of the newly independent State of Namibia. I stress incidentally, Mr. President, that we are not asking the Court to resolve any dispute that may arise, or may have arisen, with respect to Namibia any more than with any other third State dispute. Professor Bowett said that this argument was "little short of ludicrous". His explanation was that

> "the Mandate for South-West Africa was terminated because there was a fundamental breach and South Africa continued to be responsible because it continued in unlawful possession" (CR 91/16, p. 16).

But the point is, and I hope I may be forgiven for repeating it, that South Africa continued in possession on the terms of the mandate, in the sense that it was too bound by the obligation that was contained in the mandate, and the relevant United Nations organs clearly envisaged the possibility of the survival of claims against it *after* the independence of Namibia. Moreover at least one of those claims, that to Walvis Bay, involved acts of South Africa that predated the General Assembly's termination of the mandate.

24. For these reasons, Mr. President, the Nauruan right to rehabilitation was not terminated by operation of law, as the inevitable consequence of General Assembly resolution 2347 (XXII). The question remains whether it was terminated by implication, and to this I now turn.

THE GENERAL ASSEMBLY DID NOT IMPLIEDLY REJECT THE NAURUAN REHABILITATION CLAIM

25. Australia also argued that the General Assembly impliedly terminated the Nauruan claim. In particular it drew that inference from the general and unreserved, what was described as the "welcoming", language of resolution 2347 (XXII) (see CR 91/16, p. 16). The argument was briefly made, and can be briefly refuted. What resolution 2347 welcomed was the statement made by the Administering Authority that it would comply "with the request of the Nauruan people for full and unqualified independence" (Nauru Memorial, Vol. 4, Ann. 17, para. 2). It would be a strange form of compliance, and a strange form of welcome, at the same time to confer independence on the people of a trust territory and to reject one of their clearly expressed wishes in relation to the conferral of independence. That wish was expressed by the representative of the Nauruan people in the Trusteeship Council. It was that the rehabilitation issue should be left to be resolved after independence on a bilateral basis. Nor can the illusion of waiver in the Fourth Committee be relied on, since the terms of operative paragraph 2 of resolution 2347 are identical to, and are obviously taken from, the language of Trusteeship Council resolution 2149 (S-XIII) of 22 November 1967 (see Nauru Memorial, Vol. 4, Ann. 19). The wording in the two paragraphs is identical. And that Trusteeship Council resolution was adopted before the alleged waiver by Mr. DeRoburt in the Fourth Committee!

26. There are other reasons for concluding that resolution 2347 (XXII) does not purport to terminate, or adjudicate upon, the Nauruans' claim. For example the resolution "recalls" the earlier resolutions on the issue (resolutions 2111 (XX) and 2226 (XXI)), resolutions which called for the rehabilitation of the lands. Those resolutions were not recalled, Mr. President, for the purpose of being rescinded! Nor is it the case that references to earlier resolutions of the General Assembly are merely historical, as Professor Jiménez de Aréchaga argued (CR 91/15, p. 60). How many explanations of votes or abstentions have been recorded in the General Assembly because some earlier, disfavoured resolution has been "recalled" or brought to mind?

27. This conclusion is also sufficient to dispose of Australia's argument that a decision in Nauru's favour would "reflect upon the authority — even the competence — of the General Assembly", to quote Professor Bowett, "would constitute the most damning indictment of the Trusteeship Council and General

Assembly" and would "amount to an accusation of either incompetence or bias" (CR 91/16, p. 14). The first point is that we are still at the stage of preliminary objections. It remains to be seen whether the Court will tend to agree or disagree with the views of the General Assembly, views which anyway tended to favour Nauru on the points at issue. It also remains to be seen what conclusion, if any, the Court will find it necessary to reach on the administrative competence of the various United Nations bodies dealing with Nauru. These are not matters for the present stage of the proceedings. The key point, however, is that the General Assembly deliberately left the issue to be resolved bilaterally, and therefore there can be no question of conflict.

WAS AN EXPRESS SAVING OF THE CLAIM REQUIRED?

28. Finally, Australia argued that because the Nauruans failed to obtain an express decision from the General Assembly in their favour, the termination of the Trusteeship Agreement terminated their claim (CR 91/16, pp. 8, 16-17). Counsel argued that "the act of discharge, unconditionally and without reservation, implies an acceptance by the Assembly that the Administering Authority has fully discharged its treaty obligations" (CR 91/16, p. 8).

But to focus on General Assembly resolution 2347 (XXII) as a "discharge" is misleading. The General Assembly was concerned to terminate the Trusteeship so as to bring about the independence of Nauru. It was not its purpose to clear the Administering Authority of fault, in relation to a matter not presented before it for decision and not necessary to be decided as a prerequisite to independence. One might as well say that a resolution welcoming the release of a person from protective detention was passed in order to clear the detaining authorities from any wrong-doing that may have been committed during the period of detention. That is an exactly equivalent argument. And the argument is even less persuasive if the release of the detainee is described, as Nauruan independence was described in resolution 2347 (XXII), as "unqualified".

There is no authority requiring express recognition by the General Assembly as a precondition to the continuation of the rights of the people concerned. Not only that, but to require the renunciation of a claim on the part of the people of the trust territory, as a precondition to their independence, would violate rules in relation to self-determination that were well-established by 1967. In particular it would violate the rule stated in paragraph 5 of resolution 1514, that the independence of Trust and Non-Self-Governing Territories is to occur "without any conditions or reservations". There is no indication at all that the General Assembly sought to impose such a condition.

29. Mr President, even if there is a requirement of express recognition of the continuing Nauruan claim by the relevant political organ, and I have argued that there is not, but even if there is, it is submitted that there was sufficient recognition of that right here. In particular there was ample recognition of the Nauruan claim, by reason of the terms of resolutions 2111 (XX) and 2226 (XXI); the reaffirmation of those resolutions in resolution 2347 (XXII); and the resolution of the Committee of Twenty-Four of 27 September 1967. These have been extensively discussed in the Memorial and by other Counsel appearing for Nauru, and you will be relieved to hear that I will not repeat what they have said (see the Nauru Memorial, paras. 586-587, 604-608, 610, 613-614 for details).

30. It should be stressed that Nauru does not argue that its right to rehabilitation arises by virtue of any particular resolution of the General Assembly, the Trusteeship Council or the Committee of Twenty-four, notwithstanding their

support for Nauru's position. The right arises by reason of the relevant rules of international law, treaty law and general international law, as they apply in the circumstances of the case. Given that that is so, the most that could be required in the case of a termination would be recognition of the claim in question as a subsisting claim. We were not asking for an *impera marta*, the only thing that would be required would be recognition, and there is ample evidence of such recognition here.

31. Additional support for this conclusion is provided by the accepted principles of interpretation. United Nations resolutions are, like treaties, to be interpreted in the context of relevant principles of general international law. In the present case, the relevant principle is the principle of self-determination, including the important rule, stated in paragraph 5 of General Assembly resolution 1514 (XV) and which was at the time being increasingly stressed by the General Assembly, that the independence of Trust and Non-Self-Governing Territories is to occur,

> "without any conditions or reservations, in accordance with their freely-expressed will and desire . . . in order to enable them to enjoy complete independence".

The role of United Nations organs was to give effect to that principle.

32. As earlier Counsel have stressed, the Nauruan position on this issue was well known to delegations attending the Trusteeship Council and General Assembly. No delegation — not even the Australian delegation — contradicted the Nauruan representative's reservation with respect to the issue of rehabilitation.

CONCLUSION

33. For all these reasons, it is submitted that the Nauruan claim survived the termination of the Trusteeship Agreement, an event which was contemporaneous with the independence of Nauru.

The Australian Agent argued that a decision in Nauru's favour on this point would have serious adverse consequences in several ways. First, he said, it would "open the floodgates" of post-independence claims, which have usually been regarded as governed by some form of clean-slate doctrine. Secondly, it would create uncertainty in the minds of former Administering Powers as to the possibility of claims being brought against them relating to their former administrative acts. May I conclude Nauru's presentation on the issue of termination by commenting briefly on these two broader policy arguments.

34. So far as the floodgates of post-colonial claims are concerned, the primary point, of course, is that the Court's function is to do justice in accordance with international law as between the Parties before it.

But in any event, the floodgates would not be opened, not even in Holland, by a decision in Nauru's favour in this case. Nauru's position is that the legal disputes which survive termination are those which meet the following two conditions: first, the legal dispute in question must have arisen during the currency of the administration of a trust territory; and secondly, the dispute must not have been resolved by the United Nations in the process leading up to independence, whether by express resolution on the issue by a competent authority or because the issue was necessarily tied up — as it was in the *Northern Cameroons* case — with the General Assembly's decision on the form of independence. We say nothing about territories other than trust territories. We say nothing about disputes raised for the first time after independence even though these relate to pre-independence facts. We say nothing about disputes directly arising from the territorial or dispositive aspects of Trusteeship. There are few claims which meet these two conditions, and those that do can safely be left to be resolved on their merits.

35. On the question of unfairness to former Administering Powers, it is suggested that there is no unfairness. First of all, if what I have said above about the limited circumstances of the present claim is correct, the level of uncertainty involved for former Administering Powers is correspondingly slight. There are very few situations that meet the criteria I have outlined above, and accordingly, the disruptive effects — if that is what they would be — of a decision in favour of Nauru on this point would be minimal.

As far as Australia itself is concerned there is no prejudice. Australia was well aware of the claim prior to independence. The claim was asserted, and well publicized, immediately after Nauru gained independence. Australia showed in its response to diplomatic notes, and in its other contacts with Nauru in the post-independence period, a lively awareness of the claim. I refer, for example, to the Australian Minister's letter of 1968, which according to the Australian Agent, seems to have been a letter vigorously denying a claim which Nauru had not made!

36. So there was no uncertainty on the part of Australia. But if there had been, Australia was in a perfect position to resolve it during the United Nations debate. It could have proposed an additional clause to what became General Assembly resolution 2347 (XXII), an additional clause determining the rehabilitation claim against Nauru. It had the legal skills and the diplomatic resources to draft and promote such an amendment. In the Australian argument, it was said that the onus was on the Nauruans to do this. But that is unreasonable. The Nauruans were the beneficiaries of a not-yet-extinguished Trusteeship. They were present, by courtesy, as part of the Australian delegation. They were a small group, then lacking in resources. Why was the onus on them to resolve any uncertainties Australia may have had?

In fact, Mr. President, there was no uncertainty. The Nauruans had made their position clear. No doubt Australia judged — in 1967 of all years, no doubt correctly — what the chances of an amendment terminating the rehabilitation claim would have been.

37. Mr. President, Members of the Court, that concludes the Nauruan arguments on the issue of termination and its effects. With your leave, Professor Brownlie will now address the issue of the Nauruan claims with respect to the overseas assets of the British Phosphate Commissioners.

ARGUMENT OF MR. BROWNLIE

COUNSEL FOR THE GOVERNMENT OF NAURU

Professor **BROWNLIE**: Mr. President, with your permission, I constitute a sort of *entracte* between the issue of termination and the further question which my colleague, Professor Crawford, will address of joinder of parties and the principle of consent.

In this short speech, my role is to respond to the arguments presented by the distinguished Co-Agent of Australia, concerning Nauru's claim to the overseas assets of the British Phosphate Commissioners.

FIRST AUSTRALIAN ARGUMENT

Mr. Burmester produced four arguments. The first was that the claim is inadmissible because it was not made in Nauru's Application.

Mr. Burmester first of all characterizes the Nauruan claim as exclusively related to the claim for rehabilitation (CR 91/16, p. 33), and having done that, he argues that the claim to a part of the overseas assets is "clearly very different from a claim for rehabilitation". And he complains that the Application of Nauru contains no reference to the question of overseas assets (*ibid.*).

Mr. President, the true position is that the claim relating to rehabilitation is but one facet, though a facet of great importance, of a group of claims based upon breaches of the Trusteeship Agreement and related causes of action. The circumstances concerning the overseas assets and their ultimate disposal are intimately bound up with the history of the island since the beginning of the Mandate and until the disposal of the overseas assets of the British Phosphate Commissioners in 1987.

Against the background of the Application (paras. 43-52) and the Memorial of Nauru, the structure of Nauruan claims can be properly understood.

And against this background, it can be seen that the claim respecting the overseas assets flows naturally from the matrix of law and fact disclosed originally in the Application.

It is, with respect, very artificial to characterize the assets claim as "clearly very different".

In the submission of Nauru, the claim to the assets was "implicit in, and consequential on," the claims relating to breaches of the Trusteeship Agreement.

And the same applies to the claim for the harassment of fishing vessels in the *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits*, and the *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits*, cases. These and other references are to be found in the Written Statement at pages 124 to 127.

Moreover, the functional criteria applied by the Court in previous cases on the question of new claims or alleged modification of claims are amply fulfilled. As in the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility* case, it would make no practical sense to require Nauru to institute fresh proceedings to deal with the question of title to a part of the overseas assets. And, of course, there is no good reason to allow defects of form, if that is what they are, to outweigh considerations of practical convenience.

Furthermore, there is clearly, in our submission, no ground for alleging procedural prejudice or surprise.

As the diplomatic correspondence reveals, Nauru was very prompt in its reactions to reports concerning the disposal of the overseas assets. This correspondence can be examined conveniently in Nauru's Written Statement (pp. 117-120, paras. 335-341). And the same correspondence involved interested third States with a very short time and so, in our submission, Mr. Burmester's point about notification to other States lacks substance.

And so the conclusion on this Australian argument on assets is that the Australian argument that the claim to overseas assets does not appear in the Application is an argument that does not constitute a basis of inadmissibility.

SECOND AUSTRALIAN ARGUMENT

And so I move to the second Australian argument which is that there is no legal dispute within the meaning of Article 36 (2) of the Statute.

This contention of Mr. Burmester should, in our submission, not detain the Court for long. The diplomatic exchanges are clear enough. I would direct the Court's attention to two items.

The first is the letter from the President of Nauru, dated 4 May 1987. It is in diplomatic language but it also adopts a firm tone and it includes the following passages:

> "I have read with some interest of the recent visit to Australia of Sir Geoffrey Howe, the British Foreign Secretary. From news reports it appears that he and you have discussed amongst other things, matters of regional Pacific interest.
>
> It occurred to me, therefore, a most opportune moment to raise with you a matter of great concern to my government. We were concerned to learn by your Diplomatic Note in January, along with Notes from the United Kingdom and New Zealand, that the assets of the British Phosphate Commissioners were about to be wound up by an agreement then shortly to be signed. As you are, no doubt, aware, my government voiced that concern by a further Diplomatic Note to you dated 30 January 1987. This was sent in similar terms to both the other partner governments in the former Trust. So far there has been no reply to this Note."

and the President continues:

> "My government takes the strong view that such assets, whose ultimate derivation largely arises from the very soil of Nauru Island, should be directed towards assistance in its rehabilitation, particularly to that one-third which was mined prior to Independence.
>
> The Note to you and other governments, however, was by way of an interim measure merely moving you to withold distribution of assets until the report of the present independent Commission of Inquiry in the Rehabilitation of the Worked-Out Phosphate Lands of Nauru has been completed and published. My government is, of course, optimistic that your Australian government will participate in such inquiry and make such submissions to it as it deems fit." (Preliminary Objections of Australia, Vol. II, Ann. 13.)

The second item is a letter dated 23 July 1987, which I have already referred to — yesterday — in which the President of Nauru replies to a temporizing letter from the Australian Minister for Foreign Affairs. In the operative paragraph there, if I may repeat it, the President says:

> "I refer to your letter dated 15 June 1987 relating to the matter of the disposal of assets of the British Phosphate Commissioners.
>
> I am sure, taking into account my Government's knowledge of the manner of accumulation of surplus funds by the British Phosphate Commissioners, that you would not be surprised if I were to say that I find it difficult to accept your statement that the residual assets of the British Phosphate Commissioners were not derived in part from its Nauru operations. I shall not, however, pursue that here but leave it perhaps for another place and another time." (Nauru Memorial, Vol. 4, Ann. 80, No. 14.)

Mr. President, allowing for the nature of the correspondence and the personal flavour which it carries, the existence of an unresolved issue is very clear. And it must be remembered that both Governments would understand the context and the historical background well enough.

Beyond this, the Australian argument that there is no evidence of a legal dispute, involves a repetition of the theme we have heard on other occasions that statements can only provide evidence of a dispute if they involve formal claims in phraseology which anticipates the terms of an Application.

In the submission of Nauru, there is a sufficiency of evidence that a legal dispute existed.

But there is also a submission in the alternative.

The position of Nauru is that the claim to the overseas assets is clearly "implicit in and consequential on" the claims set forth in the Application, in accordance with the criteria applied to subsidiary claims in the *Temple* case (*I.C.J. Reports 1962*, p. 36). On this basis, there is no necessity for an autonomous body of evidence of a legal dispute. On this basis also, Mr. Burmester's argument could only prosper if he could show that Nauru had actually renounced the subsidiary claim.

THIRD AUSTRALIAN ARGUMENT

I now move on to the third Australian argument on this point which is that Nauru has not shown any legal interest in the overseas assets (CR 91/16, pp. 40-42).

If I may say so, this argument competes for lack of merit with certain other Australian positions.

The Nauruan position has been expressed fully in the Written Statement (pp. 131-137, paras. 369-386). The key considerations are there elaborated. Against the background of the 1919 Agreement, the British Phosphate Commissioners operated in tandem with the Administration. Any power to accumulate and deal with assets was subject first to the Mandate and thereafter to the Trusteeship Agreement.

Mr. Burmester's argument involves describing the British Phosphate Commissioners as "the business of a foreign national" (CR 91/16, p. 41) and thus ignores the legal context of trusteeship completely.

I may say that, like other members of the Australian delegation, he is insensitive to the question of the ownership of the phosphate lands.

Counsel for Australia appear to be unaware that the Nauruan community was the beneficiary of the Trusteeship régime and not the British Phosphate Commissioners or Australian farmers.

Yet, Mr. Burmester seeks to oppose the interests of the BPC, having no status in the Trusteeship régime, to the interests of the beneficiary of that régime, the people of Nauru.

In completing my response to the argument on legal interest, I have to say that it is ironical that the Co-Agent for Australia, in seeking to deny the legal interest of Nauru, has placed on the record a significant admission.

Thus he had this to say:

> "The assets distributed in 1987 were derived from a number of sources. They, in fact, represented decades of trading by the BPC in phosphate, in shipping and other activities. Some of the assets may have been derived from the proceeds of sale of Nauruan phosphate. Some may have come from the sale, in 1967, on the BPC's Nauruan assets to Nauru. However, much of the BPC's remaining assets came from elsewhere and did not derive from Nauru at all." (CR 91/16, p. 31.)

But this passage does recognize that "some of the assets may have been derived from the proceeds of sale of Nauruan phosphate".

The Nauruan position is developed in Chapter 7 of the Memorial. In the Written Statement (paras. 385-386) we have found it necessary to make certain declarations concerning access to documents held by Australia, relating to the overseas assets. By way of conclusion, we would like to emphasize that Nauru considers that at the present phase of the proceedings, for purposes of admissibility, for purposes of this phase of preliminary objections, it is sufficient for the Applicant State to demonstrate that it is reasonably certain that a legally protected interest exists in an identifiable body of assets. And in the same context, it is not necessary that the applicant State identifies specific aspects or indicate a precise percentage of the value of assets to which Nauru is entitled.

On the other issues raised by Mr. Burmester, Nauru is content to reaffirm the positions adopted in the Written Pleadings.

And in particular on the forced purchase of BPC assets on Nauru in 1967 the Court is asked to refer to the Memorial (pp. 180-181, paras. 496-500). The passages there respond to the argument of Mr. Burmester (CR 91/16, p. 41), who seeks to use this particular prejudicial transaction as a further source of prejudice to Nauru.

FOURTH AUSTRALIAN ARGUMENT

Then there is the final fourth Australian argument in which Mr. Burmester seeks to apply each of the Preliminary Objections made by Australia to Nauru's other claims as he puts it equally to the overseas assets claim (CR 91/16, pp. 42-43).

This is a rather strange application which one assumes would be difficult to apply to the evidence of waiver and the evidence of delay. These arguments of course clash with what Mr. Burmester now describes as a "new claim" (CR 91/16, p. 32) relating to the assets.

And on these questions Nauru is content by way of sufficient reply to invoke the relevant passages of its Written Statement (paras. 361-368, 390-391).

Mr. President, that concludes my second speech, and I thank the Court for its patience and consideration.

The Court adjourned from 11.15 to 11.30 a.m.

ARGUMENT OF MR. CRAWFORD

COUNSEL FOR THE GOVERNMENT OF NAURU

Professor CRAWFORD: Mr. President, Members of the Court.

1. This part of the oral submissions of the Republic of Nauru will address the argument that the present case cannot continue against Australia as sole respondent, because this would violate the principle of consent in international law.

Relationship between Indispensable Parties Rule and the Principle of Consent

2. In its Written Statement, Nauru addressed these issues in Chapter V of Part IV, under the general heading "Joinder or Consent of Third Parties" (see Written Statement, paras. 244-323). Nauru reaffirms, and will certainly not repeat, what is said there. The Nauruan arguments were a response to arguments in the Preliminary Objections of Australia, to the effect that the other two States were "indispensable parties" to the proceedings, within the principle of the *Monetary Gold Removed from Rome in 1943* case (*I.C.J. Reports 1954*, p. 32). Australia argued this was so, either because any decision adverse to it would imply a right of recourse against the other two States (Preliminary Objections of Australia, paras. 347-348), or because any such decision would imply that those States are also legally responsible to Nauru and they have not consented to such a decision (Preliminary Objections of Australia, paras. 349-366). They were the two grounds of the argument in the Preliminary Objections of Australia.

By contrast, Professor Pellet in his oral presentation stressed that Australia's objection was based not on any issue of joinder, nor on any application of the "indispensable parties" rule, but on the basic principle of consent (CR 91/16, pp. 50-52). With an airy wave of the hand he thereby sought to dismiss the long line of decisions, cited in the Nauruan Written Statement, which deal with the power of the Court to decide cases, notwithstanding the absence of a third State or States whose legal rights or interests are implicated in the decision. Both the Preliminary Objections of Australia and Nauru's Written Statement had dealt with that statement under the rubric of "joinder of parties".

No doubt, the principle of consent in international law and the rules relating to joinder or non-joinder of third parties are not simply identical. The principle of consent is a fundamental principle, having consequences across the whole field of international law. But the precise issue before the Court is this: how does the principle of consent apply to its judicial jurisdiction in the absence of a third party with a direct interest in the case? What is its effect as a matter of the admissibility of proceedings? And this is an issue which the Court has faced again and again, with results that are impressively consistent.

In short, the cases on indisputable parties, or on the effects of non-joinder, are authorities on consent. And the reason is simple. If the third party was properly before the Court as a party, that would be because it had consented to the jurisdiction. In other words, the rule which these cases establish is the primary manifestation of the consent principle in the present context of the admissibility of claims affecting third parties.

Thus the *Monetary Gold Removed from Rome in 1943* case (*I.C.J. Reports 1954*, p. 32) can be put equally as an authority on indispensable parties, or as an authority on consent. It can be said that the Court could not exercise jurisdiction in that case because an indispensable party was not before it. Or it can be said that the Court could not exercise jurisdiction in that case because a State whose rights or legal interests would be affected in a particular way had not consented to the proceedings. Either way, it comes to the same thing. The very subject-matter of the dispute in that case, that is to say the *Monetary Gold Removed from Rome in 1943* case, involved the legal rights or responsibilities of a State not a party. That State had not consented to become a party, and had not consented to the adjudication of the case in its absence.

3. So what is the principle of the admissibility of proceedings between two States when the factual situation underlying the proceedings involves or implicates more than just those States? Where is the line to be drawn between Nauru's right to choose the State against which to bring proceedings, and a third State's right in effect to prevent such proceedings by refusing to consent to them?

The short answer is as follows — and I say this by way of summary of Nauru's general submission on this issue. At the level of admissibility, at the level of preliminary objections, the absence of third parties is a fatal objection in only the clearest and rarest cases. Once the Court has jurisdiction as between two parties, it has consistently elected to do justice between them as far as it can. The Court has consistently said that it will only decline to hear a case which somehow affects a third State if the legal rights or liabilities of that State are the very subject-matter of the proceeding.

Mr. President, the subject-matter of this proceeding, in substance and in form, is the responsibility of Australia to Nauru in respect of the rehabilitation of the lands. That responsibility arose from rules of international law, both customary international law and treaty law, binding on Australia. That responsibility arose because of the acts of Australia's own officials, acting in Australia's interests, and (if it matters) in no sense under the direction or control of other States. To establish that responsibility in no way requires Nauru to rely on the wrongful acts of other States. That being so, the proceedings are admissible, despite the fact that neither Australia nor Nauru has sought to join third parties which were also involved. The interests of third parties are protected by Article 59 of the Statute and by the mechanisms available under the Statute for intervention. Those interests do not need to be protected at Nauru's expense, by preventing it from obtaining a judicial determination of a long-asserted claim.

CERTAIN PRELIMINARY MATTERS

4. Before seeking to justify the answer I have just given, and to deal with the Australian arguments in more detail, let me make two preliminary points.

5. My first preliminary point relates to the idea that the Administering Authority under the Trusteeship may have been in some sense a separate legal entity. Counsel for Australia chided Nauru for arguing in its Written Statement, that the Administering Authority was "not a separate legal entity in international law". Australia, he said, had never argued that it was such an entity (CR 91/16, pp. 55-56; see Nauru Written Statement, paras. 284-287).

Well, in the first place the Preliminary Objections of Australia rely on the British decisions involving responsibility for the debts of the International Tin Council (see Preliminary Objections of Australia, para. 314). And those cases involved precisely the issue of whether the member States of an international organization, a separate legal entity both in international law and in English law, were themselves liable for its debts. The cases were decided by the House of Lords on the basis that, because the debts were those of a separate legal entity, the member States were not liable (see *Rayner (J.H.) (Mincing Lane) Ltd.* v. *Department of Trade; Maclaine Watson* v. *Department of Trade* [1990] AC 418). If there is no question in Australia's mind that the Administering Authority was or was not a separate legal entity, why then did it cite the International Tin Council cases in its Preliminary Objections?

But there is a more profound point here as well. The Australian Agent expressed it in his opening address, when he said that "Australia did not administer the Trust territory" (CR 91/15, p. 13). And that was the very first thing he said. The implication is clear: it was "not our responsibility". But, if not, whose responsibility could it be but that of a separate legal person? — that separate legal person that Professor Pellet disavows and disowns?

Mr. President, there is no third thing between the liability of a separate legal entity, such as an international organization with separate legal personality, and the liability of one or several States — to use the words of Article 81 of the Charter. States remain responsible for their own actions, even if they may perform them on behalf of, or in conjunction with, others as well as themselves. Any other view would produce legal irresponsibility.

There is, I regret to say, evidence of such irresponsibility in the Preliminary Objections of Australia, where Australia went so far as to deny that it was under any obligation to comply with the Trusteeship Agreement. Instead, it attributed that obligation to a "partnership" constituting the Administering Authority (Preliminary Objections of Australia, para. 321). But there is no general principle of law that a "partnership" constitutes a separate legal entity. It certainly does not do so under the legal systems of Australia, the United Kingdom, New Zealand or Nauru. Nor is there any indication of an intention on the part of the United Nations to constitute or to recognize as a separate legal entity an "Administering Authority" somehow separate and distinct from the States which were involved. Article 81 of the Charter refers indistinguishably to an Administering Authority consisting of "one or several States", and it could not possibly be argued that a single State which was an Administering Authority was somehow in that capacity a separate legal entity. If that is true of a single State, it is true of several States.

Is it any surprise, then, that Nauru insists that the "Administering Authority" was not a separate legal entity, in the way that an international organization is an entity separate from its members? The term "Administering Authority" in this case was simply a legal description for a particular arrangement which involved a degree of participation on the part of the other two States, a device for associating the United Kingdom and New Zealand in the administration of Nauru. And as I shall demonstrate later in these remarks, that association, though initially it may have been intended to be substantial, was nominal and consultative only. It does not prevent these proceedings being brought against Australia alone.

6. My second preliminary point is this. By definition, the situation we are now dealing with concerns a State that *is* a party to the proceedings, that *has* accepted the Court's jurisdiction, and that would otherwise be at risk of being found to have breached international law. And the question is, can it escape that potential finding by relying on the concurrent breaches of international law of another State or States which have not consented to the proceedings, or at least, which are not parties? In other words, where, as between the wronged State and

the wrongdoing State, should the burden fall, of the potential consequences or implications for third parties also arguably guilty of wrongdoing. Should an applicant State, which claims to have been wronged, be denied its day in court because the court only has jurisdiction over one or some of the wrongdoers, and other potential wrongdoers have not consented, or are not parties?

THE PRINCIPLE OF CONSENT AND THE ADMISSIBILITY OF THESE PROCEEDINGS

7. Mr. President, when one looks at what international courts confronted with this issue have done and said, there can be no doubt as to the answer. The Court is entitled to hear a case otherwise properly brought between two States, unless the legal rights of another State would form the very subject-matter of the decision.

8. Clear authority for that proposition is contained in the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* (*I.C.J. Reports 1984*, p. 392). I refer the Court to the discussion of that case in the Nauruan Written Statement, at paragraphs 250 to 252. The key passage in the Court's decision is set out in full in paragraph 251 of the Nauruan Written Statement, and I will only read, of that passage, the central section. The Court, after referring to the *Monetary Gold Removed from Rome in 1943* case, expressed the principle as follows:

> "Where . . . claims of a legal nature are made by an Applicant against a Respondent . . . and made the subject of submissions, the Court has in principle merely to decide upon those submissions, with binding force for the parties only, and no other State, in accordance with Article 59 of the Statute . . . other States which consider that they may be affected are free to institute separate proceedings, or to employ the procedure of intervention . . . The circumstances of the *Monetary Gold* case probably represent the limit of the power of the Court to refuse to exercise its jurisdiction; and none of the States referred to [that is to the States involved in the *Nicaragua* case] can be regarded as in the same position as Albania in that case, so as to be truly indispensable to the pursuance of the proceedings." (*I.C.J. Reports 1984*, p. 392, at p. 431.)

In fact this issue had been strenuously and very fully argued by the United States. But the Court was unanimous in rejecting the United States argument.

9. Counsel for Australia sought to distinguish the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* case. He particularly relied on the understanding of the dispute expressed by Judge Ruda (CR 91/17, p. 41). Judge Ruda's views, of course, were expressed in a separate opinion in the jurisdictional phase of the case (*I.C.J. Reports 1984*, p. 392, at pp. 456-458), and he briefly repeated those views in his dissenting opinion in the merits phase. That was the only point on which Judge Ruda dissented at the merits phase. But Judge Ruda was concerned not with the *Monetary Gold* principle but with the issue raised by the Vandenberg amendment, the jurisdictional reservation relating to multilateral treaties. Judge Ruda agreed with the rest of the Court on the *Monetary Gold* issue, but he adopted an even more formal and discreet view of the dispute than did the Court itself, when it came to addressing the issues raised by the Vandenberg amendment. Judge Ruda's dissent on that issue is of no assistance to Australia in relation to the issue now before the Court.

10. The *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* case involved responsibility for action jointly taken by a respondent State and third States. The Court has taken a very similar approach in cases involving the potential rights of third States, including territorial rights. Again, Nauru has analysed these decisions in its Written Statement (paras. 254-260) and I will not repeat that analysis here. But because Professor Pellet made some play with the Chamber's decision in the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* case, I should say something about that case.

11. It will be recalled that the issue there was whether the waters of the Gulf of Fonseca are subject to a condominium or to what was termed a "community of interests" of the three riparian States. The argument for present purposes is the same whether one talks about condominium or community of interests, so I will talk about condominium. In seeking to intervene in the proceedings, Nicaragua argued that its legal interest in the Gulf and in adjacent waters was such that the Court could not proceed to decide the case in its absence under the *Monetary Gold Removed from Rome in 1943* principle (*I.C.J. Reports 1990*, p. 92, at p. 114). The Chamber rejected that argument. It said, amongst other things:

> "So far as the condominium is concerned, the essential question in issue between the Parties is not the intrinsic validity of the 1917 Judgement of the Central American Court of Justice as between the parties to the proceedings in that Court, but the opposability to Honduras, which was not such a party, either of that Judgement itself or of the régime declared by the Judgement . . . It is true that a decision of the Chamber rejecting El Salvador's contentions, and finding that there is no condominium in the waters of the Gulf which is opposable to Honduras, would be tantamount to a finding that there is no condominium at all . . . such a decision would therefore evidently affect an interest of a legal nature of Nicaragua; but even so that interest would not be the 'very subject-matter of the decision' in the way that the interests of Albania were in the [*Monetary Gold* case]." (*I.C.J. Reports 1990*, p. 92, at p. 122.)

Counsel for Australia made no express criticism of this passage, notwithstanding that, looking at it from Australia's point of view in this case, it drew a sharp and rather artificial, it might be thought, distinction between the existence of a condominium in the Gulf and its opposability to Honduras. Indeed, Professor Pellet compared the problem of the existence of a condominium with Nauru's claim, which, he said, is a claim against an Administering Authority composed of three States. It is impossible, he said, to pronounce on the rights of one of those States without pronouncing on the rights of others (CR 91/17, pp. 43-44).

With respect this does not really account for what the Chamber said in the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* case. Given Professor Pellet's flexible way of determining what is the real object of a case, I will come back to that later, and the Chamber's acceptance that "a decision of the Chamber . . . finding that there is no condominium in the waters of the Gulf which is opposable to Honduras, would be tantamount to a finding that there is no condominium at all", why was that not the object of the case? Australia gives no reason. And the present case is considerably clearer. Nauru is not here challenging the right of the other States to have been involved in the Trusteeship. It is merely seeking a determination of the responsibility of one State for its own acts committed on Nauru and doing serious harm to Nauru. And it is doing so in relation to a régime which was precisely not a condominium, and in which the interests of the Nauruan people were the very object of the arrangement. So those were the cases very briefly stated on which the Court has gone on to exercise judgment notwithstanding the interests including quite direct legal interests of third States.

12. On the other side of the line — and alone on the other side of the line — is the *Monetary Gold* case itself. I refer to, and adopt, the analysis of the case contained in the Nauru Written Statement, paragraph 261. Any other decision in the *Monetary Gold* case would have converted the Court into an enforcement agency in relation to decisions made in the absence of the debtor State, quite contrary to the provisions of the Charter and the Statute relating to the enforcement of decisions of the Court.

But the present case is quite unlike *Monetary Gold*. The legal rights or property of the United Kingdom and New Zealand are not the subject-matter of the present claim. No legal right or responsibility of either State needs to be proved or would be determined by the Court in this case. There are several reasons for this. First of all, what Nauru seeks here is a judgment, initially a declaratory judgment but at a later stage it may be a money judgment, against Australia. If Nauru succeeds on the merits, that judgment will not be opposable to any other State. It will require no conduct from any other State. Its legal effects will be purely bilateral. But in addition the focus of the claim is on the acts and omissions of Australia and of Australian officials responsible for the administration of Nauru. The determination of the liability of a third State to one of the parties is not a precondition to the determination of this case. In order to establish its claim Nauru does not need to prove a single act committed by anyone other than Australia, or an Australian official.

Counsel for Australia conceded that the *Monetary Gold* case was a case where the liability of a third State was a precondition (*préalable nécessaire*) to the determination of the claim between the parties. He also conceded that in the present case there is no such precondition (CR 91/17, p. 44). Nauru's, he said, was merely a case of simultaneity where simultaneous responsibility would be shown. And as decisions such as the *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*) case show, simultaneity is not enough. Simultaneously with a decision that the United States was not entitled to engage in collective self-defence operations in and against Nicaragua, the Court in effect made a decision about the involvement of the States on whose behalf the United States was acting and it was quite clear about that.

In the present case, it is not necessary for the Court to determine that any other State is legally responsible, before it is in a position to determine that Australia is legally responsible. It can simply proceed to consider the relevant legal instruments, and the implications of the acts and omissions of Australia acting through its officials who carried on the administration of Nauru. Nothing more is required. It is true that there may be implications for other States of any findings by the Court which are adverse to Australia. But this was so for El Salvador in the Nicaragua case. It is so for Nicaragua in the *Land, Island and Maritime Frontier Dispute* (*El Salvador/Honduras*) case. In neither case was it a reason for the Court declining to exercise jurisdiction as between the parties. Nor is it here.

13. The position with the *Monetary Gold* principle is the same even if one asserts, as Australia sought to do, that there was a distinction between Australia's two capacities in the present case. It had a capacity as "actual administrator" and a capacity as a member of the "Administering Authority". That was one version of the argument. One response to the argument is that Australia in

its capacity as the actual administrator of Nauru was bound by rules of international law just as stringent as was the Administering Authority. Australia is sued in the present case in any relevant capacity, if it had more than one. But such a distinction is illusory. We have already seen, already submitted, that the Administering Authority was not a separate legal entity, but simply the three States. Australia may have acted on behalf of the other two States, but it could not have acted on behalf of itself. In relation to itself, it just acted.

Parenthetically I might point out that the phrase that Australia was acting "on behalf of" the Administering Authority should not be taken to import into the trusteeship régime the principles which apply to agent-principal relations under municipal legal systems. The Trusteeship Agreement refers to Australia as acting "on behalf of" the three States, but does not use the term "agent". Even if it had, there would be a real question what that meant. In so far as the trusteeship system and Australia's obligations under the Charter were concerned, there could have been no difference between the rules that bound it in its conduct on Nauru as part of the Administering Authority from the rules that bound it as agent. The most serious issues would arise if a Trusteeship Agreement had at the same time delegated "full powers", or for that matter, any powers, to a State which was not the Administering Authority, and had purported to authorize that State to act in ways that were prohibited to the Administering Authority under Chapter XII of the Charter. That would have been to authorize a violation of the Charter, which the General Assembly plainly had no intention of doing.

15. Thus the simple answer is the best answer. Australia in its capacity as administrator of Nauru was obliged to the full extent by the Charter and the Trusteeship Agreement, and by related rules of international law. That responsibility was primary and not derivative. There is no question of any precondition to a direct determination of Australia's liability, of the sort that arose in the *Monetary Gold* case.

16. There is another difficulty, Mr. President, in applying the *Monetary Gold* case principle here, and it is a difficulty specific to the context of trusteeship. The underlying idea of trusteeship, which is expressed in the Charter, is that the interests of the beneficiary are to be the paramount consideration, while the interests of the administrator, even its legitimate interests, are secondary. Yet to apply the *Monetary Gold* principle to prevent an adjudication of the liability of the administrator towards the beneficiary would be to elevate the procedural interests of the administrator over and above the procedural interests of the beneficiary. In other words, to apply the *Monetary Gold* principle to preclude an action for breach of trust would be inconsistent with the trusteeship notion itself. And the trusteeship principle, being a Charter principle, must prevail.

17. However the argument is put, the conclusion is clear. The present case is properly constituted and should proceed to a determination on the merits. Naturally enough Counsel for Australia strove to avoid this conclusion, raising a number of more or less complex counter-arguments which I will have to deal with in turn. Before doing so, and to assist the Court in distinguishing the different versions of these counter-arguments, I should first of all itemize some, and I apologize to Professor Pellet if I do not do this in precisely the order in which he made them.

Australia argues that the consent principle precludes the exercise of jurisdiction in the present proceedings for the following five reasons.

(1) First, because of the joint character of the Trusteeship, which incorporated a rule of equality between the three Partner Governments.

(2) Secondly, because of the joint character of the British Phosphate Commissioners, which was, according to Australia, a form of economic government of the Island.

(3) Thirdly, because any finding adverse to Australia would be a finding of a liability which was *commune, conjointe, collective — en tout cas indissociable* (CR 91/17, p. 17).

(4) Fourthly, because of the "inevitable implications" for the United Kingdom and New Zealand of an adverse finding in relation to Australia.

(5) And finally, because the substance of the present claim was that it was brought against New Zealand and the United Kingdom as well as against Australia.

In Nauru's submission, none of these reasons has any validity in the present case. Let me deal with each of these arguments in turn.

AUSTRALIA'S OBJECTIONS BASED ON THE JOINT CHARACTER OF THE TRUSTEESHIP

18. Australia argued that the three Partner Governments formed a joint administration of the Trusteeship, with the corollary that they could, and can, only be sued together. Thus, Professor Pellet emphasized the equality of the three States. They were, he said, placed on a position of "perfect equality" (CR 91/16, p. 56).

Mr. President, there is a certain irony in this argument. As the Nauruan Memorial demonstrates, Australia originally wanted Nauru for itself, either as a colony or, when it became clear that that was not possible, as a mandate under its sole administration. It sought — and I think it is not unfair to say that it fought — throughout the Mandate and Trusteeship to gain an increasingly exclusive authority over the government of the territory. By the time of the Nauru Agreement of 1965, it had substantially achieved this. And now, after the termination of the Mandate and Trusteeship, it seeks to rely on a formal, even fictional, equality which during the currency of the Mandate and Trusteeship it never ceased to resist (see Nauru Memorial, Vol. 1, paras. 29-35, and authorities there cited).

In fact, the different role and substantially greater power of Australia with respect to the administration of Nauru are plain from the various instruments, as even a brief review will demonstrate.

19. Under the Nauru Island Agreement of 2 July 1919 between the three States (Nauru Memorial, Vol. 4, Ann. 26), the administration of the island was vested in an Administrator appointed by the Australian Government for a term of five years (Art. 1). After the end of the five years, the Administrator was to be "appointed in such a manner as the three Governments decide" (*ibid.*). At this stage, therefore, there was the possibility, at least on paper, of one of the other Governments appointing the Administrator, and thus becoming the effective governing entity for Nauru.

20. Under the League of Nations Mandate for Nauru of 17 December 1920 (Nauru Memorial, Vol. 4, Ann. 27), the Mandate was conferred upon "His Britannic Majesty", and the Mandatory was given "full power of administration and legislation over the territory, subject to the present Mandate, as an integral portion of his territory" (Art. 2). Professor Pellet had difficulty with the term "His Britannic Majesty", and I do not blame him. Not for the first time British statesmen used the constitutional complexities of the late British Empire as a

vehicle for postponing a practical decision. Fortunately, the "enigma" represented by the British Empire has long since vanished. The Mandate was concluded at a time when what were then called the dominions were emerging as separate international entities. It was drawn up during the heyday of what was called the *inter se* doctrine — a largely unavailing attempt by the United Kingdom to exclude international law from the relations between the States of the former British Empire. None of that matters now. The Trusteeship Agreement simply refers to three States, who are members of the United Nations, and recognized the special position of one of them, that is to say, Australia.

21. As to the Mandate period, all that needs to be said here is that it was Australia which was the embodiment or emanation of "His Britannic Majesty" for the purpose of exercising "full power of administration and legislation over the territory subject to the present Mandate as an integral portion of his territory". It is true that there was, as least on paper, a question who would appoint the Administrator after the first five years. But that question was settled by an agreement — which was not formalized in a treaty form — whereby Australia, after consultation with the other two Governments, continued to appoint successive Administrators.

And the primary role in the administration of Nauru of Australia as the appointing Government was strengthened by the Supplementary Agreement concerning Nauru of 30 May 1923 (Nauru Memorial, Vol. 4, Ann. 28). Under Article 1 of that Agreement, ordinances made by the Administrator on Nauru were subject to disallowance by the appointing Government, and by no other Government. Under Article 2, the Administrator was required to conform to the instructions of the appointing Government, and not to the instructions of any other Government. Under Article 3, copies of ordinances, proclamations and regulations were to be forwarded to the other two Parties, but only "for their information". Australia was the appointing Government throughout the whole period of the Mandate and, of course, throughout the whole period of the Trusteeship.

22. It should be recalled that Nauru was a "Class C" Mandate, one which could, according to Article 22, paragraph 6, of the League of Nations Covenant:

> "best be administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population".

Nauru was administered as an integral portion of Australian territory. Its administration bore no relation to the territory of any other State. As far as can be discovered, no governmental official of either New Zealand or the United Kingdom lived on Nauru during the period from 1920 to early 1968, or performed governmental acts there. Throughout the whole of that period, the government officials on Nauru, the Administrator and the persons responsible to him, were Australian public servants, answerable to other Australian public servants in Canberra, and in no sense subject to the direction or control of any other Government. Article 22 of the Covenant referred to administration "under the laws of the Mandatory"; in fact, those laws were Australian. No British or New Zealand law was ever applied to Nauru.

23. It is true, as Professor Pellet pointed out, citing Macdonald, that Australia consulted its partners before appointing each successive Administrator. But in the same passage, which was read in full by Professor Connell (CR 91/19, p. 18), Macdonald affirms that neither New Zealand nor the United Kingdom played "any significant role" in the administration of Nauru (B. Macdonald, *In Pursuit*

of the Sacred Trust, 1988, p. 21). And that view is endorsed by the other writers on Nauru, who are cited in the Nauru Memorial (see Nauru Memorial, p. 242, footnote 3).

24. That Nauru had been in fact administered by Australia was recognized in the first preambular paragraph of the Trusteeship Agreement of 1 November 1947. Article 4 of the Agreement provided that the Government of Australia would continue to exercise "full powers of legislation, administration and jurisdiction in and over the Territory" on behalf of the three States, unless otherwise agreed (Art. 4). This marked a formal difference from the Mandate period, since the Mandate had not actually specified Australia as the administering power, whereas under Article 4, Australia would only cease to exercise full powers over Nauru if it so agreed. It never so agreed.

25. Despite this, Australia characterizes the relations between the three powers as "purely internal" (CR 91/16, p. 62). But as we have seen, the three States did not constitute, as the "Administering Authority", a separate legal person. How can there be "purely internal" relations between three distinct international persons relating to the discharge of international responsibilities imposed by a paramount instrument, the Charter? And what right did those three States have to enter into what are described as "internal" arrangements, if the effect of those arrangements was to shuffle off individual responsibilities, to reduce the level of legal protection available to the beneficiary of the Trusteeship Agreement, whose position was the raison d'être of the whole system?

26. Counsel for Australia characterized Article 4 of the Trusteeship Agreement as concerned only with "day-to-day" administration. He also made the point that the recognition of Australia's special role by the Trusteeship Agreement was limited to Article 4 (CR 91/16, pp. 56, 61). But to describe Australia's "full powers of legislation, administration and jurisdiction in and over the Territory" (Art. 4) as being limited to matters of day-to-day administration is to trivialize those powers. It is as if one were to describe the powers of the Emperor Augustus as limited to matters of the day-to-day administration of the Roman Empire! No doubt there is a sense in which all administration is "day-to-day" — where can we live but days? But that is not a limitation, and it is not the point Australia was trying to make.

27. Moreover, Australia's special role over Nauru was not confined — if "confined" is the right word — to the "full powers" referred to in Article 4. On each of the other matters referred to in the Trusteeship Agreement, Australia's role was dominant, paramount or even exclusive. The actual administration of the Territory, covered by Article 3, was in fact a matter for Australia, as I have shown. The Australian Administrator was the "competent public authority" for the purposes of Article 5, paragraph 2 *(a)*. Governmental responsibility over the recognition of Nauruan custom, the transfer of Nauruan land to non-Nauruans, the "economic, social, educational and cultural advancement" of the Nauruans, the increasing share in administrative and other services of the Territory and the guarantee of freedoms such as freedom of speech and of religion — these are the specific matters referred to in Article 5 — all of these were matters within the actual control and responsibility of Australia. One might take as an example the issue of the freedom of the Nauruans to communicate with legal and economic advisers, something covered in general terms by Article 3 and, more specifically, by Articles 5, paragraph 2 *(b)*, *(c)* and *(d)*. Other Counsel for Nauru have noted that Australia denied the Nauruans access to independent legal or economic advice until 1964. Had New Zealand or the United Kingdom disagreed with that policy, there was nothing, other than the making of representations, that they could have done about it. They certainly would have had no

authority to change it. Under Article 6 of the Trusteeship Agreement, the international agreements which were applied to Nauru were a selection of the international agreements to which Australia was a party. As far as is known, no consideration was given to applying to Nauru the provisions of any treaty to which either New Zealand or the United Kingdom was a party but Australia was not. And the defence of Nauru, which is the subject covered in Article 7, was a matter for Australia.

28. This extensive dominance over the Government of Nauru was made virtually complete by the Nauru Agreement of 26 November 1965 (Nauru Memorial, Vol. 4, Ann. 30). Mr. President, this is of particular significance, since as beetween the three Partner Governments it was under the terms of the 1965 Agreement that Nauru was governed throughout the crucial pre-independence period.

The terms of the 1965 Agreement are analysed in paragraph 293 of the Nauruan Written Statement. I refer in particular to Article 6 of the Agreement, under which Australia reserved the right to make "such other provisions in relation to the government of the Territory *as the Government of Australia deems necessary or convenient*" (emphasis added). Clearly this meant that Australia could govern Nauru irrespective of the views of the other two States. This is a strange form of equality!

In addition, Article 1 of the 1919 Agreement, and the whole of the 1923 Agreement, was terminated in 1965 (Art. 7). The effect of this was to put an end to the duty of the Administrator, which had existed under Article 3 of the 1923 Agreement, to "supply, through the Contracting Government by which he has been appointed such other information regarding the administration of the island as either of the other Contracting Governments shall require". After 1965 the other two Governments had no right even to obtain information about Nauru. They were wholly dependent upon what Australia chose to give them.

29. The Nauru Agreement of 1965 was given effect to in Australian law by the Nauru Act of 1965 (Nauru Memorial, Vol. 4, Ann. 39). I do not want to burden the Court with details of Australian constitutional law, but it is worth pointing out that prior to the 1965 Act the constitutional status of Nauru was that it was a Crown colony governed by Australia under prerogative power. The Nauru Act 1965 treats Nauru as an Australian external territory, with its officials subject to effective Australian authority. There is a reference in Section 6, Sub-section 1, of the Act to the administration of the territory being carried out on behalf of the three Governments. But that reference has no operational effect in terms of the Act.

30. All the relevant negotiations with respect to Nauru in the period 1965 to 1967, and all the legal acts required from the point of view of the pre-independence legal system to bring Nauru to independence, all of these acts were carried out by Australian officials acting under the instructions of the Australian Government, and by Australian legislation. I refer for example to the Nauru Independence Act 1967 (Nauru Memorial, Vol. 4, Ann. 40). No equivalent legislation was passed by New Zealand or the United Kingdom.

31. So far as the Nauru Talks are concerned, the role of the United Kingdom and New Zealand officials who were present was consultative only. The 1965 Talks were held with "Australian Officials representing Administering Authority", or with the "Australian Delegation" for short. The 1966 and 1967 Canberra Talks were held with a "Joint Delegation of Officials representing the Administering Authority". The transcripts of the Talks are contained in Volume 3 of the Nauru Memorial. If I may just interpolate, it has been difficult to obtain good copies of the transcripts of the Talks, these are simply the best copies that are available and we apologize for the difficulties that everyone is experiencing

making their way through them; this is simply the best that can be provided. With one exception, the meeting of 14 June 1967, New Zealand and the United Kingdom were present by a representative or representatives at the meetings. But they barely spoke. In 1966, according to the summary records, the British representatives never spoke; the New Zealand representatives only spoke once (Nauru Memorial, Vol. 3, Ann. 4, Meeting of 20 June 1966, p. 3 (Mr. Ansell)). In 1967 the British representatives are recorded as having spoken once (Nauru Memorial, Vol. 3, Ann. 5, Meeting of 12 April 1967, p. 100 (Mr. Morgan)), the New Zealand representatives five times (Nauru Memorial, Vol. 3, Ann. 5, Meetings of 16 May 1967, pp. 57, 59, 61 (twice); 12 May 1967, 65 (on each occasion, Mr. Ansell)). None of those interventions was of any significance to the issues under discussion: their total length was not much more than one printed page out of more than 500 of the total pages of the Talks including Annexes. This near-silence shows very clearly the relative roles of the three Governments in relation to Nauruan affairs.

32. Counsel for Australia gave up the unequal task of showing equality in the actual administration of Nauru, and relied primarily on the combined role of the three States concerned at the international level, for example in the General Assembly and the Trusteeship Council (CR 91/16, pp. 62-64). But again it was the Australian representatives who took the leading role, speaking first in the general debates, answering the questions of the Permanent Mandates Commission and the Trusteeship Council, and so on. Moreover, although international obligations were owed to the Nauruan people, they had no separate standing in international forums at this stage. What Counsel for Australia refers to as the internal arena of affairs on Nauru was precisely the arena where the Trusteeship obligation was primarily owed, and where the damage was done.

33. Mr. President and Members of the Court, it is simply not true to say, as Australia does (Preliminary Objections of Australia, para. 341), that "the Administrator was responsible to all three Governments". An executive official is responsible to a superior who can give him instructions, and at least since 1923 only the Australian Government could do that. Nor is it true to say that New Zealand and the United Kingdom "in no relevant sense acted differently from Australia" (Preliminary Objections of Australia, para. 359). No United Kingdom or New Zealand official exercised governing authority over Nauru as Administrator or otherwise. No United Kingdom or New Zealand legislation formed part of the law of Nauru. Both the terms on which and the modalities by which Nauru achieved independence were the result of the legal acts of Australia — a conclusion which is not affected by the fact that there was consultation with the other two Governments about those issues.

34. To summarize, although Counsel for Australia placed much stress on the agency issue, relying on the maxim *qui fecit per alium fecit per se* (CR 91/15, p. 68), that maxim has nothing to do with the present case. Australia did nothing *per alium*, everything *per se ipsum* — nothing through anyone else, everything itself. It should be held responsible for its own acts.

AUSTRALIA'S OBJECTIONS BASED ON THE JOINT CHARACTER OF THE BRITISH PHOSPHATE COMMISSIONERS

35. Australia's second line of defence was to point to the joint operation by the three Governments of the British Phosphate Commissioners. They constituted, according to Professor Pellet's argument, the *régime juridique* on Nauru so far as economic matters and the exploitation of phosphate were concerned. They

were, he said, "the economic administration" of Nauru (CR 91/17, p. 8). A Visiting Mission Report, cited by Professor Pellet with approval, described them as having "une *indépendance administrative* presque totale". That was an additional and distinct reason why it was wrong to single out Australia.

36. It may be conceded that the three Governments did share equally in the operation of the BPC, from an administrative point of view, although they did not share equally in the use of Nauruan phosphate, of which Australia took the lion's share.

But that is not the point of the case. The British Phosphate Commissioners were not parties to the Trusteeship Agreement. Whatever their economic power might have been, they had no legal power on Nauru. Their existence and authority was recognized neither in the Mandate nor in the Trusteeship Agreement. Both the League of Nations and the United Nations expressed concern that the Australian administration of Nauru was improperly preferring the interests of the BPC, an industrial enterprise, over the interests of the Nauruan people, the beneficiaries of the trust, and was therefore involved in a conflict of interest and duty.

It should be noted that the Visiting Mission Report cited by Professor Pellet was not approving the position or conduct of the BPC on Nauru. It was merely describing it, and doing it in rather reserved terms.

On the merits of this case, Nauru will argue that there was never any ratification or approval by either the League of Nations or the United Nations of the position of the BPC, that is, of course, a central issue on the merits.

The gist of Nauru's rehabilitation claim is not that the BPC was somehow in breach of trust for mining the phosphate. It is that Australia was in breach of the Trusteeship obligation, and of associated principles of general international law, in allowing BPC to mine on terms that paid no regard to the legitimate rights of the Nauruan people, and in failing to redress the adverse consequences of the mining on the rights and legal interests of the Nauruan people, rights recognized by the Trusteeship Agreement and by general international law.

37. Mr. President, as I have mentioned, most of these issues are self-evidently issues for the merits. The relationship between the 1919 Agreement and the Mandate and the Trusteeship Agreement raises issues which are discussed at length in the Nauruan Memorial (see Part IV, Chap. 3), but on which Australia has not yet had the opportunity to plead. I need only say here that the present proceedings could still have been brought, in essentially their present form, had the British Phosphate Commissioners been a purely private enterprise, which is what Mr. Burmester for Australia said they were, and which is what for most of the time they claimed to be. No doubt the fact that Australia benefited substantially from the operations of the BPC is relevant to a consideration of the merits of the Nauruan claims. But the Australian involvement as partner in and chief beneficiary of the BPC's operations on Nauru can hardly make its position in these proceedings any *better* than it would otherwise have been, if BPC had been a private entity. And that was the point of the Australian argument.

AUSTRALIA'S OBJECTIONS BASED ON THE EXISTENCE OF AN ALLEGED "JOINT LIABILITY"

38. Australia's third line of defence related to the legal situation of joint, or conjoint, responsibility which is said to be the inevitable consequence of the administrative arrangements for Nauru. This makes it, according to Australia, impossible to distinguish the aspect of the damage done by Australia from the aspects done by the other two States.

39. Mr. President, I might observe, in parenthesis, that the three Governments knew perfectly well who was entitled to what when it came to partitioning amongst them the overseas assets of the British Phosphate Commissioners, in 1987. In that exercise they could calculate to the nearest dollar. It is only when the issue is that of accounting to the Nauruans for the damage to their lands that the problem of solidarity emerges, that things become unclear, that there is what might be called a "collective unconscious". Only when it comes to the claims of the Nauruans based on the principle of trusteeship is there an insoluble accounting problem!

40. But what is the consequence in international law of a loss to a claimant caused concurrently by the acts of two persons, or caused by the acts of a person acting both on its own behalf and on behalf of another? That consequence might be felt at several levels: at the level of admissibility of a claim brought, as the present claim is brought, against the person who by its own acts caused the harm; at the level of the consequences in terms of responsibility for the wrong; and at the level of reparation.

I have already dealt with the first level, that of admissibility, because it is indistinguishable from the cases discussed above, of which the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* case is a paradigm, where damage was done concurrently by several actors. Indeed the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* case was a stronger case, from the point of view of the Respondent State, than the present case. In the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* case the primary actors were mostly not United States officials, or persons whose acts were directly attributable to the United States. In addition, the right of the United States to act in collective self-defence was derivative rather than primary, since it was acting at the request of the States which were, in its and their view, the subject of an armed attack.

By contrast in the present case all or virtually all the actors were Australian. Australia's position on Nauru was not derivative of that of another State. Counsel for Australia sought to stress that the Australian position on Nauru derived in point of title from that of the three States jointly, and he compared the situation to that of a condominium (CR 91/17, pp. 43-44). But neither Australia nor any other State had any title to be on Nauru except under the trusteeship system, the basic principle of which was the paramount interests of the people of the territory. A mandate or a trust territory involved no *dominium*, no sovereignty, of the Administering Authority, and the analogy of *condominium* is completely inappropriate.

41. The second level — I have been dealing with the first level of admissibility — on the context of this question is that of the extent and nature of liability in the case of acts performed jointly or concurrently by several States. Another possibility, which corresponds more exactly to the situation here, is that of acts performed by one State on its own behalf as well as on behalf of another State or States. And the first and obvious point to be made here is that this is plainly a matter for the merits. The legal régime established by the Trusteeship Agreement, and the relationship between that régime and the arrangements for the exploitation of the phosphate, are what Nauru's claim is all about. Even applying the narrow definition of merits given by the Australian Agent, this is plainly a matter for the merits — it requires the Court to analyse the juridical regime on Nauru *au fond*, to its depths — a matter plainly inappropriate at this stage of the proceedings.

42. Nauru submits that, when two or more States are involved in some form

of common enterprise, they are nonetheless separately responsible for their own acts. A State is responsible for what it itself does, acting through its organs and officials, and through other persons whose conduct is attributable to it, notwithstanding that that act occurs with the participation or support of other States. I refer to the authorities cited in the Nauru Memorial (Vol. 1, paras. 623-630) which I will not repeat.

43. Although it is not necessary to make more than a passing reference to the point at this phase of the case, the work of the International Law Commission on State responsibility supports Nauru's position. For example the Commission in its 1978 commentary to the Draft Articles on State Responsibility stated:

> "A similar conclusion is called for in cases of parallel attribution of a single course of conduct to several States, as when the conduct in question has been adopted by an organ common to a number of States. According to the principles on which the articles of Chapter II of the draft are based, the conduct of the common organ cannot be considered otherwise than as an act of each of the States whose common organ it is. If that conduct is not in conformity with an international obligation, then two or more States will concurrently have committed separate, although identical, internationally wrongful acts." (*Yearbook of the International Law Commission*, 1978, Vol. 2 (2), p. 99.)

Two or more States, I repeat, will concurrently have committed separate although identical, internationally wrongful acts. It should be noted that in this passage the Commission was discussing the situation of a common organ of several States. That situation is much stronger in favour of joint responsibility than is the present case, since normally each State would exercise a measure of control over a common organ, whereas only Australia had such control here. But even in relation to common organs properly so-called, the Commission favoured a system of separate liability.

44. The Preliminary Objections of Australia, Mr. President, relied heavily on domestic law analogies to support its view that the liability of States engaged in a joint enterprise was "joint" or "inseverable", rather than "joint and several" (Preliminary Objections of Australia, paras. 309, 342). Counsel for Australia, by contrast, tended to agree with the view in the Nauruan Written Statement, that domestic law analogies in this field were of limited significance. Certainly this must be true in detail: the refinements of particular legal systems in the field of joint responsibility are so often the product of history and of particular legal and economic institutions, that it is dangerous to generalize. It is particularly dangerous to adopt the terminology of particular municipal legal systems, which terminology often carries with it the incubus of a framework of particular rules. In the *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*) case, the Court warned that private law analogies, especially in fields such as admissibility, were unreliable because they tend to assume the existence of powers which international courts and tribunals do not have, including the compulsory power of joinder (*I.C.J. Reports 1984*, p. 392 at p. 431).

45. But having said that, some useful points can be gained from the domestic law experience in dealing with liability for joint conduct. I will not repeat the extensive review of authorities contained in the Nauruan Written Statement (paras. 266-277), which is itself based on the very extensive work done on the topic for the *International Encyclopedia of Comparative Law* under the general editorship of Professor André Tunc. It is sufficient to cite the general conclusion reached in the section on "Complex Liabilities" in the *Encyclopedia*:

> "It is the very general rule that if a tortfeasor's behaviour is held to be a cause of the victim's harm, the tortfeasor is liable to pay for all of the harm so caused, notwithstanding that there was a concurrent cause of that harm and that another is responsible for that cause . . . In other words, the liability of a tortfeasor is not affected vis-à-vis the victim by the consideration that another is concurrently liable." (*International Encyclopedia of Comparative Law*, Vol. XI, *Torts*, A. Tunc, Chief Editor, Chap. 12, A. Weir, "Complex Liabilities", 1983, p. 43; see further Nauruan Written Statement, paras. 274-275.)

46. Similarly in one of the *Aerial Incident* cases (*United States* v. *Bulgaria*), the United States argued that:

> "it appears that in all civilized countries the rule is substantially the same. An aggrieved plaintiff may sue all or any joint tortfeasors, jointly or severally, although he may collect from them, or any one or more of them, only the full amount of the damage.
>
> The relationship between the joint tortfeasors themselves is a separate problem." (United States Memorial, *I.C.J. Pleadings, Aerial Incident of 27 July 1955*, pp. 229-230, and see its comparative survey, *ibid.*, pp. 230-233.)

The point I am making is that you cannot have multiple recoveries exceeding the amount of the damage.

47. At the procedural level, the comparative law position is essentially the same. It has not been possible to find a case where a claim based on a civil wrong or breach of trust resulting from the conduct of joint wrongdoers has been dismissed on the preliminary ground that not all the wrongdoers were amenable to the jurisdiction of the court concerned (see Nauruan Written Statement, paras. 279-281, and the authorities there cited).

48. Finally, it should be noted that the rule asserted by Australia would not even have applied had the British Phosphate Commissioners been sued in tort or for breach of trust. The British Phosphate Commissioners were not a separately incorporated entity: they were what they describe themselves as a partnership. And the rule of Australian, English and New Zealand law is that the liability of partners for both torts or civil wrongs, and for breach of trust, is joint and several. That means — I am obviously having to use common law terminology to describe a common law rule — that the beneficiary has the right to sue any individual trustee for the whole amount of the damage (see Glanville Williams, *Joint Obligations*, London, 1949, p. 159 and cases there cited; and see further Nauru, Written Statement, paras. 271-273).

49. Professor Pellet put the argument in another way. He spent some time analysing the United Kingdom and New Zealand acceptances of the Court's jurisdiction under the Optional Clause. His argument was put in this form. The Court can only condemn a State if it alone is responsible. Having regard to the absence of jurisdiction under the Optional Clause, the Court has no jurisdiction to determine that New Zealand and the United Kingdom are or are not responsible. Therefore, since the Court cannot determine that only Australia is responsible, it cannot proceed with the case. That was the argument.

In response, I should first say that since both States are parties, that is to say since both the United Kingdom and New Zealand are parties to the Statute and both have declarations in force under the Optional Clause, it is not conceded that they have not consented. But, for present purposes, the central point is this: the Court is not competent in the present proceedings to interpret any provisions in the Optional Clause declarations of the United Kingdom and New Zealand that they might seek to rely on if they were parties to proceedings commenced by Nauru — or, for that matter, if they were parties to proceedings commenced by Australia.

Thus the premise "The Court can only condemn a State if it alone is responsible" subtly mis-states the position. The Court can never, in proceedings against one State, determine that *only* that State is responsible. To do so it would have to determine the responsibility of non-parties, and that it cannot do. The true position is that the Court can only determine the responsibility of a State which *is* a party to the proceedings and, further, that it should (if it has jurisdiction over that State and if the case is otherwise admissible) proceed to do so, unless as a pre-condition it has to determine the responsibility of some other State. That is not the case here.

50. Mr. President, I have given this issue a more summary treatment than it would require were the Court facing the issue as a matter of the merits of the claim. Nauru's primary submission is that this issue does not possess in the circumstances an exclusively preliminary character. And the reason is simple. The extent and nature of Australia's liability in this case can only be determined after a detailed examination of the basis of the claim and all the relevant facts. Before that point, it is possible only to speak in general terms.

But speaking in general terms, one can say, and Nauru submits, that there is no authority for, and a great weight of international and comparative authority against, the proposition that there is a régime of joint liability in international law requiring the participation of all States involved before judgment can be given against any. Even if situations can be imagined in which there might be a rule of strict joint liability, it is not the case that the present claim for breach of trusteeship, or of associated general international law rules, falls into that category.

AUSTRALIA'S OBJECTIONS BASED ON THE "INEVITABLE IMPLICATIONS" FOR THIRD STATES OF A DECISION AGAINST AUSTRALIA

51. Mr. President, Australia's fourth line of defence was to argue that, because of the "inevitable implications" for New Zealand and the United Kingdom of a decision against Australia, the case should not proceed. Counsel argued that a decision adverse to Australia would necessarily imply that Australia has a right of recourse against the United Kingdom and New Zealand. A similar argument is made in the Preliminary Objections of Australia (paras. 352-353).

52. But a decision of the Court against Australia would not determine the issue whether Australia has a right of recourse against the United Kingdom and New Zealand. The existence of a right of recourse between States jointly participating in wrongful activity is a separate issue from the liability of one of those States to a person injured by that activity. The United Kingdom and New Zealand may well have defences to an Australian claim. The existence and extent of any such defences would have to be determined in those separate proceedings. As the Chamber pointed out in the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* case, "[a] case with a new party and new issues to be decided, would be a new case" (*I.C.J. Reports 1990*, p. 92 at p. 134).

53. One can illustrate the point by reflecting for a moment on the issues that would be likely to arise in proceedings brought by Australia against one or both of the other two States. They might argue — and I am talking about proceedings

brought by Australia — that the principal wrongdoer may not seek contribution for the consequences of its own wrongful acts by claiming against a secondary wrongdoer or co-conspiritor. Such a rule exists in a number of national legal systems. The Court would have to determine whether it applies to international wrongs. Alternatively they might argue that the formula for distribution of assets set out in the 1987 Agreement should be applied, either because of its terms or by analogy, as an expression of fairness or equity between the parties. Although Nauru has been affected by it, the formula in the 1987 Agreement is not opposable to Nauru. Nauru has no particular interest in how the issue is resolved as between the three States.

This is, of course, speculation — but that is the *point*. None of these issues involves Nauru; none arises in the present proceedings. And because these issues do not arise, it is not the case that the liability of the other two States is an inevitable and inseparable corollary of a finding adverse to Australia in the present proceedings.

54. But, Mr. President, even if the Court's decision in this case carried the necessary implication that Australia has a prima facie right of recourse against the United Kingdom and New Zealand, that should not prevent the Court from exercising its jurisdiction in the present case. As we have seen, the Court has not allowed itself to be deterred from the due administration of international justice by any "logical corollary" of its findings, to use the phrase that the Court used in the *Frontier Dispute (Burkina Faso/Republic of Mali)* case (*I.C.J. Reports 1986*, p. 554 at para. 578). Similarly, the fact that a finding as between the Parties would be "tantamount" to a finding in respect of the legal position of a third party, did not deter the Court in the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* case (*I.C.J. Reports 1990*, p. 92 at para. 122). The same position applies here.

THE "SUBSTANCE" OF THE DISPUTE

55. Fifthly, and finally, Mr. President, Australia argued that the substance of the present claim was that it was a claim brought against the United Kingdom and New Zealand. To a great extent this was another way of putting the arguments that I have already dealt with, and in particular the argument that the inseparable character of Australian liability prevents a determination. To that extent, the arguments that I have set out above are a sufficient response on this point. But to the extent that it was an independent argument, some brief remarks are in order.

56. It is a little ironic that, while insisting that the Court should penetrate the substance of the Nauruan claim to discern a legal claim against New Zealand and the United Kingdom, counsel for Australia was much less willing to look at the substance of the relationship between the three Governments as to the administration of Nauru. But however that may be, there is no reason to treat this claim as anything other than what it is, a claim against Australia relating to the acts and omissions of its own officials and authorities in a matter of major concern to the applicant State. International law does not require a State to pursue remedies against all possible or potential respondents at the same time: it leaves, within very broad limits, a choice of means and of remedies. As the Court observed in the case concerning *United States Diplomatic and Consular Staff in Tehran*, "no provision of the Statute or Rules contemplates that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important" (*I.C.J. Reports 1980*,

p. 19, para. 36). Nauru would say, in this case, however unimportant. And it cited that principle, and applied it to the situation of claims brought against one State arising from a multi-party dispute, in the *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility* (*I.C.J. Reports 1988*, p. 69 at para. 91).

In short, there is no substance to the argument that the substance of the present proceedings differs from its form.

THE CONSEQUENCES FOR ADMISSIBILITY OF THE TERMINATION OF THE TRUSTEESHIP AND THE DISSOLUTION OF THE BRITISH PHOSPHATE COMMISSIONERS

57. Mr. President, that concludes the Nauruan account of the Australian counter-arguments on the principle of consent and related issues. I would like to make just two further points, both of which strongly support the conclusion that the Court ought to proceed to hear this case.

58. The first of these relates to the fact that this claim is brought now, after the termination of the Trusteeship and the dissolution of the British Phosphate Commissioners. Whatever the position might have been during the currency of the Trusteeship, there is no reason to think that after its termination a requirement of joint and inseparable proceedings for liability should be imposed. That would be to require a joint action after the joint conduct which was the subject of the action — I have already said, of course, that it was not joint conduct in any relevant sense — had ceased. As the cases cited in Nauru's Written Statement demonstrate, even where national law rules of joinder or of joint liability apply during a relationship such as a partnership, they do not apply after its termination (Written Statement, para. 272).

59. And this point was effectively acknowledged by the three Governments themselves in the 1987 Agreement (Nauru Memorial, Vol. 4, Ann. 31). Article 3 of that Agreement envisages that claims will be brought and, by inference, will succeed against one of the three Governments "arising out of the actions of the Commissioners or former Commissioners as such". If, as envisaged by the 1987 Agreement, a system of joint and several liability — to use common-law terminology — applies to the acts of the Commissioners after the dissolution of the partnership, this must be true, *a fortiori*, in the case of a claim against Australia in respect of its administration of Nauru under the Trusteeship Agreement.

NAURU'S CLAIM AND THE DUE ADMINISTRATION OF INTERNATIONAL JUSTICE

60. Finally, Mr. President, it is submitted that the Court could not play its proper role in the administration of international justice if a State could immunize itself from jurisdiction by associating itself with others in the commission of some wrong. The Australian argument would make States effectively immune from international proceedings against them in respect of their own acts, provided those acts were performed jointly with or on behalf of another State or States. In fact, the Court, confronted with such cases, has always dealt with the issue before it on its merits, except, as I have said, where the rights of another State were the very subject-matter of the dispute (as in the *Monetary Gold* case).

61. This is borne out, for example, by the *Corfu Channel* case (*I.C.J.*

Reports 1949, p. 1). There, the Court held that Albania was liable for the damage done to United Kingdom ships by mines laid in Albanian territory, although the mines were not laid by Albania itself. After noting that Yugoslavia — which was, shall I say, "strongly suspected" of having laid the mines — was not a party to the case, the Court commented that the only question it had to decide was whether Albania was liable under international law for the damage (*ibid.*, p. 17). It held that Albania was liable, on the basis that it had means of knowing about the presence of the mines and went on to assess the full amount of the British loss against Albania (*ibid.*, p. 23; and see *Corfu Channel* case (*Assessment of Compensation*), *I.C.J. Reports 1949*, p. 244). That was a decision against a State which was not the primary wrongdoer, in the sense of the State whose acts were the immediate cause of the damage.

JOINDER TO THE MERITS

62. Mr. President, the Australian argument canvassed a wide range of issues arising from the so-called "joint administration" of Nauru and the joint liability that was said to arise from this. I have accordingly dealt with all of these issues, but this is without prejudice to the question whether any of them should be joined to the merits of the claim. I refer to what the Nauruan Agent has already said on that matter.

Mr. President, Members of the Court, that concludes my submissions on this point, and the Nauruan argument. Thank you for your patience and consideration.

The **PRESIDENT**: Thank you very much, Professor Crawford. That completes the presentation of the Nauruan case at this stage of the proceedings.

I think the Agents are aware that two Judges wish to ask questions and we will proceed to that now. I shall ask each one of them to put his questions orally, but a written version of the questions will be immediately available to the Agents. The questions may be answered either in the second round of pleadings, on Thursday and Friday, or, if the Agents so wish, they may be answered in writing later on within, shall we say, a reasonable time after the end of the oral proceedings[1].

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[1] For the written replies by the Parties, see pp. 499-504. [*Note by the Registry*.]

QUESTIONS PUT BY JUDGE SCHWEBEL

Judge **SCHWEBEL**: I have questions for Nauru and also questions for Australia.

First, for Nauru: Evidence has been introduced indicating that Nauru has maintained and maintains claims against the United Kingdom and against New Zealand based on the fact that phosphate lands worked out before Nauru's independence have not been rehabilitated (see, for example, Nauru's Memorial, Vol. 3, p. 356, para. 8: "each of the three Partner Governments should bear this cost [of rehabilitation] in proportion to the benefits they have already derived from the use of cheap phosphate at well below the world price"). The Court's attention has particularly been drawn to Notes dated 20 May 1989, despatched by the Republic of Nauru to the representatives of the Governments of New Zealand and the United Kingdom, in which Nauru refers to its Application in this case against Australia and states that it is without prejudice to Nauru's position that New Zealand, and the United Kingdom, in their capacity as States party to the Mandate and the Trusteeship, were also responsible for the breaches of those Agreements and of general international law (*ibid.*, Vol. 4, Ann. 80, Nos 29 and 30).

And we have also heard, this morning, of Nauru's claims respecting the overseas assets of the British Phosphate Commissioners whose tripartite character has been described. We have heard the views of Counsel for Australia as to why Nauru's Application is directed against Australia alone and was not also brought against New Zealand and the United Kingdom. This morning we have just heard why, in Nauru's view, it need not have brought suit against New Zealand and the United Kingdom. What is the position of Nauru as to why it did not at the same time bring suit against New Zealand? What is the position of Nauru as to why it did not at the same time bring suit against the United Kingdom?

Secondly, for Australia: Australia's recognition of the Court's compulsory jurisdiction under Article 36, paragraph 2, of the Statute provides that it "does not apply to any dispute in regard to which the Parties have agreed or shall agree to have recourse to some other method of peaceful settlement". This reservation gives rise to these questions:

- Does this reservation mean simply that the Parties must have agreed to have recourse to some other method of peaceful settlement, whether in the event that recourse is employed or, if employed, is successful or not in resolving their dispute, or does it mean that that other method of peaceful settlement must have been successful — in the eyes of both Parties — in resolving their dispute?
- May the agreement of the Parties to have recourse to some other method of peaceful settlement be not only express but tacit and evidenced by their course of conduct? Is agreement by course of conduct the theory which Australia advances in the current case? If so, are there precedents in addition to that invoked by Australia, namely, elements of the *Cameroons* case, which support this construction of such a reservation?

QUESTIONS PUT BY JUDGE SHAHABUDDEEN

Judge SHAHABUDDEEN: I have two questions. The first is for both Parties. The second is for Australia.

The first question is this. The reservation in Australia's optional clause declaration states that

> "this declaration does not apply to any dispute in regard to which the parties thereto have agreed or shall agree to have recourse to some other method of peaceful settlement".

My question is this. Do the agreements for peaceful settlement, contemplated by this reservation, include agreements made between Australia and entities which were not States at the time when the agreements were made?

Now the second question, which is for Australia.

On Monday of last week, Professor Jiménez de Aréchaga, for Australia, told the Court the following:

> "Let us be clear on Australia's position, as it was formally described by its representatives. It was not one of declining 'responsibility for meeting the cost of rehabilitation' but on the contrary to assert that it had met that responsibility
>
> 'by ensuring that the payments to the Nauruans would be sufficiently generous to meet all expenditure necessary for . . . rehabilitation, if they [the Nauruans] decided upon it' (Preliminary Objections of Australia, Vol. II, Ann. 7, p. 34; see also Ann. 28, p. 242, para. 401)." (CR 91/15, p. 66).

Now my question is this. What was the legal basis of the responsibility for meeting the cost of rehabilitation, which Australia said it did not decline but on the contrary had met in the manner described?

The Court rose at 12.55 p.m.

CR 91/21

SEVENTH PUBLIC SITTING (21 XI 91, 10 a.m.)

Present : [See sitting of 11 XI 91.]

REPLY OF MR. GRIFFITH

AGENT FOR THE GOVERNMENT OF AUSTRALIA

Mr. GRIFFITH : Mr. President, Members of the Court : Article 79 (5) of the Rules requires that I deal only with those matters relevant to our objections, and prohibits me from responding in detail to the very many factual matters which occupied so much of the time of the first four counsel, unexpectedly for us introduced to the Court as "experts in the affairs of Nauru" (CR 91/18, p. 8).

So directed, we adopt what has been described against us by Professor Brownlie as the "Trappist" approach, and remain silent rather than join issue on the many matters of fact canvassed by our opponents which are not truly relevant to our objections. For the same reason, we do not respond, in context or in kind, to the many occasions where our arguments have been answered only by colourful invective mixed with recurring incantations to logic and common sense.

We must, however, clarify two or three matters so that Court is not left with an incorrect impression of fault.

Nauru lays the blame for the failure of the resettlement proposals on Australia. But, resettlement was an idea first introduced by the Trusteeship Council. It was raised as an appropriate solution for Nauru as early as 1951, by the United Nations Visiting Mission (see 1951 Report of the United Nations Visiting Mission, Nauruan Memorial, Vol. 4, Ann. 7). Thus it was in response to such requests that the Partner Governments and Nauruan representatives investigated possibilities for resettlement. Of course, it was the right of the Nauruan Community to make its own decision on resettlement. So it was Nauru, and not Australia, which made the decision in 1964 to reject resettlement when Australia said that it could not give up sovereignty over Curtis Island (Preliminary Objections of Australia, para. 63), and of course the Court will understand that Australia was in no position to transfer sovereignty of any portion of its territory.

Thus, the ending of resettlement negotiations was a matter of fact, not of fault. When this occured in 1964, the question of rehabilitation came into the fore.

We know that the Davey Committee inquired into that question, and each of the members was appointed with the approval of Nauruan representatives, and one was a representative of the United Nations (Report of the Davey Committee at p. 2 in Nauruan Memorial, Vol. 3, p. 212).

As we have heard, the Davey Committee made a number of findings. Three are relevant for present purposes. First, that the refilling of the worked-out lands with suitable material from elsewhere should be ruled out as quite impracticable and unrealistic ; secondly, that the worked-out lands could not, practically speaking, be made suitable for agriculture, except to a very limited extent ; and thirdly, that the worked-out lands might, nonetheless, be treated so as to create a more attractive environment, suitable for habitation or other public purposes (Report, pp. 5, 37, 29, 44, in Nauruan Memorial, Ann. 3, pp. 215, 248, 250, 255). The Committee made no finding as to who should bear the responsibility for such treatment (Report, p. 26, in Nauruan Memorial, Ann. 3, p. 236). It did, however, say that steps should be taken as soon as possible to plan the Island's land use (Report, p. 44, in Nauruan Memorial, Ann. 3, p. 255).

At its 34th Session, the Trusteeship Council gave attention to the Committee's Report and specifically noted the first of its findings, to which I have just referred. The Council went on to note the strong Nauruan reservations, which were set out in the Council's Report (Preliminary Objections of Australia, Vol. II, Ann. 28, p. 240). Nauru then attacked the Committee on the grounds that it had exceeded its terms of reference, had not been briefed impartially by the Administering Authority, and had laid down policy.

The Council itself concluded by "regretting that differences continue to exist on the question of rehabilitation", and expressed "earnest" hope that it will be possible to find a solution to the satisfaction of both parties (Preliminary Objections of Australia, Vol. II, Ann. 28, p. 242). The Council clearly believed that the Davey Committee had held out very little prospect for the feasibility of any rehabilitation project.

Properly read, we say the Davey Committee Report was in keeping with the earlier reports of the Australian CSIRO Report of 1953/54, which had also found that any project intended to make the worked-out lands suitable for agriculture should be ruled out as unlikely to succeed.

The Court has been referred several times to photograph 2 in Volume 2 of the Nauruan Memorial. To put this devastating view into perspective, we must remind the Court that some two-thirds of mined lands have been excavated by Nauru since independence. Thus, two-thirds of photograph 2 fairly depicts exploitation for which Nauru accepts responsibility.

Nauru's own actions since independence confirm the limited prospects for rehabilitation. It acknowledges that it immediately resumed responsibility in relation to the area mined after 1967. Thus, Nauru has had almost a quarter of a century in which to take positive steps towards rehabilitation. Despite its insistence to the contrary, before the Court, it has not shown that it has made any real progress. Nothing has been rehabilitated. Nauru points to the stockpiling of soil. And we say little else. It is paradoxical that Nauru accuses Australia of breaching an international obligation by failing to do something which, even now, it has not done itself. With this case obviously in mind, it nonetheless has not shown that rehabilitation, even in a newly defined and limited sense, is a practical possibility.

We refer now to the statement by Chief DeRoburt in his evidence to the Court (CR 91/18, p. 13), and on this the Parties are agreed on here, that the independence negotiations dealt with three major issues:

1. Political independence;
2. Control and future operation of the phosphate industry; and
3. Rehabilitation of mined-out lands (see also CR 91/15, p. 38).

1. POLITICAL INDEPENDENCE

The Court is now all too familiar with the facts concerning this issue, and I will not refer to them further.

2. THE PHOSPHATE INDUSTRY

We know that under the terms of the 1967 Canberra Agreement, Nauru bought the capital assets at an agreed written down value.

Professor Mani has submitted that Australia "compelled" Nauru to buy its only resource, the phosphate rights (Mani, CR 91/18, pp. 46-47). This is not so. The Partner Governments did not sell, and Nauru did not buy, any rights over the phosphate lands themselves. The Partner Governments sold *only* the capital assets of the British Phosphate Commissioners on Nauru (see Article 7 of the Agreement, reproduced in Preliminary Objections of Australia, Vol. II, p. 73). So Nauru received not just the bare natural resources but a functioning industry. Shortly after the Agreement was signed, the Trusteeship Council noted the Canberra Agreement "with satisfaction" on the basis that the ownership, control and management of the phosphate industry were to be transferred to the Nauruans (Trusteeship Council Report 1967, para. 403; Preliminary Objections of Australia, Vol. II, p. 242). The only "cost" to Nauru was the depreciated cost of plant and equipment.

The Nauruans admit that they acted with competent and independent advice at this time. The basis on which the phosphate industry was handed over was fully before the relevant United Nations bodies. All was agreed. There was no voice of complaint, Nauruan or otherwise.

The result of the 1967 Agreement was that the Partner Governments transferred to Nauru their entire interest in a valuable income-producing resource. Clearly much was given up by the Partner Governments. In this context, we submit, it is also important to keep in mind the considerations of an intertemporal nature concerning these facts. Expectations of today in respect of natural resources, as much as other matters, are not always the same as yesterday.

Before the Court it is a matter of complaint that, under the Canberra Agreement, Nauru undertook to make a certain tonnage of phosphate available to the Partner Governments. But there was a mutuality in this arrangement. The Partner Governments thereby underwrote an assured market for the phosphate at world prices, adjusted annually (Canberra Agreement, Clause 5). The Nauruans took an operating business. It was not the phosphate itself but the income stream from its sale which has made Nauru wealthy. The phosphate and the fixed assets were worth nothing without a market. And this is what this part of the Agreement delivered to the Nauruans.

I turn now to the question of national wealth. The fact that Nauru chooses to lock up part of its savings in trust accounts is its own decision. There is no special rule, we say, for calculating national income peculiar to the Nauruans (cf. Mani, CR 91/18, pp. 48-49). Whether the income is spent or saved, or put aside for rehabilitation is, of course, a matter for the Nauruan people. But, on any view, their national income includes national savings.

But, what the Nauruan income figures show (and that is not in dispute in this case) is that the Partner Governments left the people of Nauru with more than adequate financial resources to make their own decisions for the future, including the rehabilitation issue. This is what Nauru wanted, and this is what it got. It was, of course, the stated intention of the Partner Governments to put the Nauruans in this position. I refer, for example, to the statement made by Mr. Smith in 1967, which has been quoted to the Court by Nauru on an earlier occasion (CR 91/18, p. 41).

Errors in the per capita figures of income of 1968 have been corrected before the Court. To bring matters 20 years up to date, in 1988 the annual per capita income for Nauru, in United States dollars, was US$10,000. This was the same as New Zealand and some 80 per cent of that of Australia (US$12,340) and the United Kingdom (US$12,810). Compare with, say, the per capita income of neighbouring Pacific countries, such as Fiji, in 1988 its per capita income was US$1,315, Papua New Guinea, US$810 (source: *World Bank World Development*

Report 1990 and *International Monetary Fund International Financial Statistics Yearbook 1989*). As to the future, the study attached to the Preliminary Objections of Australia (Vol. II, Ann. 26, p. 187) shows that in 1995, the Nauruan income from accumulated savings alone should generate a per capita income only slightly less than Australia's per capita income. On any view, we say, the Nauruans are a wealthy people.

As we have seen, the Nauruans do not put the adequacy of their means in issue in this case. Their case is that their national wealth is irrelevant. But this *must* be very relevant to test the contention that all three matters for consideration — independence, control of the phosphate industry and the rehabilitation issue — were resolved on termination of the Trusteeship. It is the fact of the agreed adequacy of financial resources which confirms there was also determination of the third issue, that of rehabilitation.

3. The Rehabilitation Issue

As we have seen, the Canberra Agreement was a bargain, struck at the termination of informed negotiations between the Parties for the purpose of resolving *all* three issues: independence, control of the phosphate industry *and* rehabilitation. As part of the negotiating process, each of Nauru and the Partner Governments conceded matters. The Partner Governments sought Nauru's recognition that they were giving up valuable rights over the phosphate deposits (Nauruan Memorial, Vol. 3, Anns. A and J, pp. 122 and 177, Record of the 1965 Negotiations; Nauruan Memorial, Vol. 3, p. 408, Agreed Minute; Nauruan Memorial, Vol. 3, p. 573, Joint Delegation, paragraph 67/2). They maintained this claim throughout the negotiations in 1966 and 1967. As Professor Mann informed the Court, Nauru refused to recognize this right (CR 91/18, p. 46) and the Partner Governments did not pursue it. They gave way.

In the same way, Nauru pressed its claim for rehabilitation. The Partner Governments refused to recognize that claim and, at the end of the day, the bargain was struck. Just as the Partner Governments gave up what they believed to be valuable rights over the phosphate deposits (quite apart from the physical assets sold to Nauru), so Nauru, we say, gave up its claim for rehabilitation. And for this, Nauru received the obvious benefit of full possession of the phosphate industry, with associated agreements which carried an assured income over the life of the deposits. This was, as we have seen, the delivery of the financial means which gave Nauru the capacity to decide the rehabilitation issue as it chose. That there was then a mutual "giving up" is obvious, despite the fact that neither matter is recorded in the 1967 Agreement. Clearly, the Partner Governments could not thereafter assert claims over the phosphate deposits and, we say, clearly also, Nauru could not thereafter assert its claim for rehabilitation.

The Partner Governments, including Australia, regarded the terms of the 1967 Canberra Agreement as particularly favourable to Nauru. Nauru disputes this. Fortunately, the Court need not concern itself as to the balance of benefit. What is important is that the Agreement was struck to dispose of the three issues identified by Chief DeRoburt. This must include the rehabilitation claim.

Good Faith

I now make some final comments on the issue of good faith. Australia has not submitted that the issue of good faith is a separate preliminary objection before the Court. Australia has invited the Court to consider, at this stage, whether the Court should exercise its discretion not to hear Nauru's claim.

Nauru has contended that this Court does not have an inherent jurisdiction (or power) to enable it to safeguard its judicial function. Clearly the Court must have such an inherent jurisdiction.

Nauru misinterprets Australia's submissions on good faith. It has constructed an edifice of fact and argument for the purposes of attack. On this issue, Australia's submissions are limited. Australia does not question Nauru's integrity. Nor does it question its rights to manage its economy as it sees fit. Australia does say, however, that the claim which Nauru now makes has been satisfied; that Nauru has delayed too long in bringing it to Court. In this connection, Australia refers once again to Nauru's continuing failure to show that rehabilitation is in fact practicable. This leads Australia to say that these proceedings should be dismissed.

Further, we maintain our submissions on delay, and we note particularly that Nauru has not mentioned any basis for its statement that its claim against the overseas assets of the British Phosphate Commissioners became actionable only in 1987 (CR 91/15, p. 57). Why should the winding up of the British Phosphate Commissioners give Nauru more rights than it had before winding up?

Australia submits that, if the Court is to protect its judicial function, it should decline to hear claims which are not credible, therefore not bona fide. This, says Australia, is the case with the Nauruan claim.

QUESTIONS

In the submissions which follow, we shall answer questions directed to us on Tuesday 19 November, apart from Judge Shahabuddeen's question directed to Australia alone, to which we shall reply in writing[1] as the answer is a little bit longer than the answers to the other questions.

With the leave of the Court, Professor Jiménez de Aréchaga will now reply on issues relevant to his submissions. If the Court pleases.

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[1] See p. 501, *infra*. [*Note by the Registry*.]

REPLY OF MR. JIMÉNEZ DE ARÉCHAGA

COUNSEL FOR THE GOVERNMENT OF AUSTRALIA

Mr. JIMÉNEZ DE ARÉCHAGA: Mr. President, distinguished Members of the Court.

At the present stage of the proceedings, there is only time for some brief comments on the statements made by the Agent and Counsel for the Applicant.

I shall begin with the statement made by the Agent for Nauru, Professor Mani, last Friday.

COMMENTS ON THE AGENT'S STATEMENT

The most striking feature in the Agent's statement is that he did not ask the Court to reject Australia's Preliminary Objections of Australia. He limited himself to ask the Court to declare that the Preliminary Objections of Australia do not have an exclusively preliminary character. That was the whole thrust of his intervention.

His singular insistence on this point may suggest a new strategy on the part of the representative of the Government of Nauru. Perhaps realizing the weakness of his case on the merits, the Agent concentrated now on merely trying to keep the case alive and pending in the General List of the Court.

In support of his contention that the Court "should declare that each of the objections raised by the Respondent State does not possess an exclusively preliminary character", the Agent for Nauru (CR 91/18, p. 31), invoked the decision which has been taken by the Court in 1984, in the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* case concerning the multilateral treaty reservation.

This is not a valid precedent for our case and, in fact, it goes in the opposite direction.

The Court was confronted in 1984 with the United States multilateral treaty reservation, which requires all parties to a multilateral treaty affected by the decision to be also parties to the case before the Court. To pronounce on that reservation the Court had the choice between two different interpretations: that which has been advanced by the United States contending that El Salvador, Costa Rica and Honduras would also be affected by the future decisions on the merits, and that proposed by Nicaragua to the effect that the reservation did not apply because the prohibition of the United Nations Charter on the use of force had become part of customary international law.

It is difficult to imagine an objection which, under any of the two interpretations, would go more deeply into the merits than this one. Obviously, that objection was not of an exclusive preliminary character, since it would have obliged the Court to anticipate the effects of its future decision on the merits or to pronounce at the preliminary stage on the nature of the substantive law applicable in the case. So the Court proceeded correctly in exercising its discretion under Article 79, paragraph 7, of the Rules and in making the declaration that the multilateral treaty objection concerned matters of substance relating to the merits of the case and, therefore, was not of an exclusively preliminary character.

But the situation, or, to borrow the language of the Rules of Court, the circumstances of the present case are not only completely different, they are opposite.

The purely preliminary character of all the objections raised by Australia, in the circumstances of the present case, is easy to demonstrate.

The first preliminary objection by Australia, concerning the Court's jurisdiction, is based on the reservation of "other means of peaceful settlement".

For its application it is sufficient to show that the Parties had agreed, expressly or by implication, with respect to certain disputes, to have recourse to other means of pacific settlement, different from judicial settlement.

It is not necessary for the operation of this reservation to show that actual settlement of the dispute had been reached. We have, however, demonstrated that settlement of the disputes was in fact achieved through the processes of the trusteeship system, but such a demonstration was made *ex abundantia cautela* and in support of other preliminary objections. From a strictly technical point of view, to achieve a final settlement is not required for the reservation to be operative. In this way I am answering the first question asked the day before yesterday by Judge Schwebel.

This assertion I have made may be confirmed by the recent Judgment of the Court concerning the Senegal/Guinea-Bissau dispute.

In this case Senegal had raised a similar preliminary objection of "other means" opposing the jurisdiction of the Court to deal with the merits of the Arbitral Award. Yet these "other means" invoked by Senegal had not resulted in a full settlement of that dispute, because the delimitation of economic zones has not been accomplished by the Arbitral Tribunal.

It is true the Court did not need to pronounce on the Senegalese preliminary objection because the other party agreed that the Court's jurisdiction at that time did not comprise the substantive dispute of maritime delimitation, but only concerned the issue of the existence and validity of the award. However, if this agreement of the Parties had not been obtained, it is very likely that the Court would have had to accept the Senegalese objection at a preliminary stage and despite the absence of a complete settlement of the dispute.

This confirms, in my submission, that the preliminary objection of "other means" does not depend on the success of these "other means", and consequently, the objection has an exclusive preliminary character, being unrelated to and independent of any merits.

* * *

The objections of inadmissibility which had been raised by Australia equally do not concern the merits and do not prejudge the basic Nauruan contention, which consists of asserting the existence under the Trusteeship Agreement of a legal and moral duty on the part of a mining operator to rehabilitate the mined-out land, *unless* he compensates for the rehabilitation costs. The issue whether the duty alleged by Nauru exists in the circumstances of the present case or whether proper compensation has been already awarded is *the question* for the merits in this case.

On the other hand, the grounds of inadmissibility invoked by Australia are by definition of a preliminary nature, and do not touch the merits, since these issues are not the same issues of fact, or of law, that will arise on the merits. Australia's main contention with respect to inadmissibility is that the Court should not be requested to undertake again the task of judging the performance of the trusteeship, so as to overrule and contradict the conclusions and decisions reached by the organs competent under the Charter. The merits are irrelevant to this contention in the sense that the question of breach of the Trusteeship Agreement is simply not involved. Whatever would have been the final decision of the General Assembly — whether that decision would have involved a finding of a breach in favour of Nauru or an absence of a breach in favour of Australia, the contention of Australia is that the Court should not review that finding, but accept the finality of the General Assembly resolution. So it is an objection of an exclusive preliminary character.

Other arguments leading to inadmissibility invoked by Australia do not touch the merits, either, since Australia contends that the Nauruan allegations of breach are precluded by the unqualified termination of the Trusteeship Agreement, which extinguished *ipso jure* any claims since no reservations or saving clauses were inserted in the General Assembly final resolution. I will deal with this point later.

⁂

Finally, the exclusive preliminary nature of the objection of lack of consent on the part of the United Kingdom and New Zealand to the Court's jurisdiction cannot be put in doubt. To accept this preliminary objection simply requires the Court to look at the record and, in the light of the applicable principles, to conclude on the absence of jurisdiction of the Court to make these two States responsible for alleged breaches of the trusteeship and condemn them *in absentia* for supposed violations of the trust.

As to the objection to the overseas assets claim, if it is a new claim, and if the Court considers it is not precluded by the Statute and the Rules, then the issue whether the Court has jurisdiction under Article 36, paragraph 2, of the Statute, does not require the Court to assess the substance of the Nauruan claim. It is only called upon to say whether there is a dispute within the meaning of Article 36, paragraph 2. And the Rules clearly contemplate that such a decision is to be made at a preliminary stage.

Yet, Mr. President, Nauru contends that, because certain of Australia's objections in Nauru's view involve complex facts, the Court cannot treat them as exclusively preliminary (CR 91/19, p. 54). But that, as I have shown, is a wrong interpretation of what makes a matter exclusively preliminary. It is not the necessity of taking facts into account that deprives an objection of its preliminary nature. The Rules recognize that in order to decide on preliminary objections the Court will need to hear and determine evidence on facts relevant to the objections (Art. 79, para. 6, of the Rules). The real question, is whether the objections themselves can only be determined by determining facts or points of law that prejudge or go directly to the merits of the claims in question. That was clearly the situation in the *Nicaragua* case. There are certain questions of law raised by Australia's objections that must be determined in order to rule on our objections. But this again, does not preclude the objections from being exclusively preliminary. As has been just shown, in relation to each one of Australia's preliminary objections, these points of law do not concern the merits of the claim, but retain an exclusively preliminary character. For this reason, the objections are able to be, and in our opinion should be, determined at the present stage.

Finally, Mr. President, in relation to these questions of preliminary objections, I need not remind the Court of the fact that the 1978 Rules are different from the earlier Rules on this point. The reason for the change was referred to in the

Agent's initial opening statement. Nauru appears to ignore this. In our submission the Court should be mindful of this change.

COMMENTS ON MR. DEROBURT'S STATEMENT

The Head Chief DeRoburt said on Friday (CR 91/18, p. 17) that since the report of the Trusteeship Council was already before the Fourth Committee, he "did not regard the Fourth Committee session as the appropriate moment or venue to restate Nauruan's position in regard to rehabilitation".

If we had had the chance to examine him, as if he were a witness, we would have asked him his views about the differences between the two organs, the Trusteeship Council and the General Assembly.

The answer, obviously, is that while the General Assembly, according to Articles 79 and 85 of the Charter, is the proper forum and the only organ competent to fix the conditions for the alteration or the termination of a trusteeship agreement, the Trusteeship Council is an organ acting under the authority of the General Assembly.

As it is well known, the two organs have a different composition. While in the Trusteeship Council there was parity of representations between administering States and other members, in the Fourth Committee of the General Assembly, there is a large anti-colonial majority.

These two differences — the powers of the respective organs and their differing membership — strongly suggested that the issue of rehabilitation would have encountered a more receptive audience in the Fourth Committee. Above all, this organ was the only appropriate forum which could adopt the necessary decisions for maintaining Nauru's rehabilitation claim or for transforming it into a financial responsibility. Yet, Head Chief DeRoburt did not dare and did not attempt to raise his reservation on the rehabilitation claim at the Fourth Committee level, as he had done in the Trusteeship Council. In our initial statement, Mr. President, we wondered about the reasons for such an abstention on his part. In his personal recollections last Friday he furnished us some clues as to the grounds for that abstention, and for the marked change in his statements between 22 November and 6 December 1967. In so doing, he confirmed our assertion as to the existence of a radical change of mind and of a radical change of position between these two dates. What happened during these 15 days in the corridors of the General Assembly?

He stated, with respect to the independence and economic viability of Nauru, that he had encountered "initial reservations, in certain quarters" (CR 91/18, p. 10). That might have been the reason why he proclaimed in the Fourth Committee that the Nauruans *had* the resources to sustain their independence, between what they had received in the past and what they will receive from their own exploitation of the phosphate, without referring to any further bonus to be received from Australia.

That was all he said, keeping silence with respect to his claim for rehabilitation.

We have contended that such silence by the interested party could not fail to have been noted by the Fourth Committee membership, and explains the absence of general support and the absence of any initiative to insert in the resolution to be adopted a saving clause or a paragraph keeping alive the rehabilitation claim. The explanation given by the Head Chief for his abstention to refer to that issue was that "it was not a moment for any acrimony".

On that, I submit that he is wrong. On the contrary, *that* was the right moment, that was the right venue, for showing the acrimony against the Administering Authority which has been displayed in the written and oral pleadings before this Court. In order to succeed in his claim DeRoburt needed at that precise moment to transform his reservation into a saving or qualifying clause to be added to the General Assembly termination resolution.

In the Trusteeship Council he had merely put on record a unilateral reservation, concerning Nauru's own position, which did not receive support or endorsement from the Trusteeship Council. That was not enough for succeeding in his purpose. What he needed to obtain from the General Assembly was not the filing and recording of another unilateral reservation, which he did not dare to make at the Fourth Committee. What he needed was a pronouncement by the General Assembly endorsing his claim, by means of an additional paragraph or a qualifying proviso added to the termination resolution, as it had been the case in 1965 and 1966. Moreover, since this was the occasion for the termination of trusteeship, Nauru needed a proviso embodying a finding of breach, not a mere recommendation as in 1965 or 1966. That was the indispensable vehicle for the survival of Nauru's claim.

Otherwise, an unqualified termination resolution, deprived of a clear finding of breach on the rehabilitation issue, was fatal to Nauru's claim, because it discharged *ipso jure* the Administering Authority of any further liability with respect to the Trusteeship. As I have said before, under the authority of Roman jurists, the absence of condemnation, in the circumstances, implied an absolution.

COMMENTS ON PROFESSOR CRAWFORD'S STATEMENT

I will make now some comments on Professor Crawford's brilliant statement of the day before yesterday. Professor Crawford referred to the welcome given in paragraph 1 of resolution 2347 of the General Assembly and derive an argument from this welcome. He also referred to paragraph 2 of the resolution but he omitted the examination of paragraph 3 of the General Assembly resolution.

Attention must be paid to this third paragraph of resolution 2347, because it refers to the agreement concluded between the United Nations and the Administering Authority terminating the Trusteeship, an agreement necessary under Articles 79 and 85 of the United Nations Charter.

This agreement to terminate the Trusteeship Agreement made the Administering Authority *functus officio* and thus divested it of any authority with respect to the territory of the island.

Consequently, the claim of rehabilitation of the land could no longer be met by the Administering Authority, which was deprived of access to the territory. In these circumstances it is obvious that the alleged obligation to rehabilitate the land became devoid of object and was consequently extinguished. It was not a question of previous resolutions being rescinded, as Professor Crawford said: these resolutions had ceased to have any possibility of application.

This simple observation demonstrates that the alleged preservation of rights beyond termination, so eloquently developed by Professor Crawford, cannot be applied in this particular instance.

Of course, our adversary might say that "in lieu" of a claim for actual rehabilitation of the land, a claim for financial compensation would have arisen, replacing the original obligation.

But one may legitimately ask how such an automatic transformation, such a novation of the original obligation, could have taken place, by a sort of spontaneous generation, amidst the total silence on the subject in resolution 2347.

It is difficult to conceive that the United Nations would enter into an agreement with the Administering Authority with the object of bringing to an end all the rights and obligations of trusteeship, and instead of granting the discharge from all responsibilities which results from its apparent terms, would enclose, by reference alone, a pending claim for breach of the trusteeship, resurrected, phoenix-like, and transformed into a claim for monetary compensation. It cannot be conceived that the United Nations Organization would have imposed upon the Partner Governments such an obligation in this sort of clandestine way, without saying so in clear terms.

The undeniable truth is that the Agreement between the United Nations and the Administering Authority, according to its terms, did not demand from the Administering Authority further contributions or responsibilities; it discharged the Partner Governments of their obligations as trustees in unconditional and unqualified terms. There was not the slightest reference to outstanding obligations or liabilities, nor was there any reference to breach or maladministration of the trusteeship. The State of Nauru, created and declared independent by that same Agreement between the United Nations and the Administering Authority, could derive all the rights and benefits resulting for it from that Agreement, such as "full and unqualified independence", and assistance from the United Nations, but it could not derive rights, claims or benefits which were not provided in the Agreement between the United Nations and the Administering Authority.

Professor Crawford also referred to the *Northern Cameroons* case, but we could not discern from his treatment of the case whether he invoked it in support of his argument or he tried to distinguish that case from the present dispute.

We on our part have referred to this case as being in support of Australia's position.

Professor Crawford quoted a passage from that Judgment (CR 91/20, p. 39). Every word of that passage is fully and literally applicable to the present case. The Court said in 1963 that the Applicant:

> "would not have had a right after 1 June 1961, when the Trusteeship Agreement was terminated and the Trust itself came to an end, to ask the Court to adjudicate at this stage upon questions affecting the rights of the inhabitants of the former Trust Territory . . ." (*I.C.J. Reports 1963*, p. 36).

In respect to this case, Professor Crawford described Judge Wellington Koo's position as diverging from the main trends of the decision. This is not so. This distinguished Judge wrote a separate opinion "broadening and strengthening the basis of the Judgment" (*I.C.J. Reports 1963*, p. 41).

We have invoked the authority of this distinguished Chinese jurist and scholar, who was one of the founding fathers of the Charter of the United Nations, and in particular of the Chapters concerning trusteeship and administration of non-self-governing territories. To give an example, he was the one who proposed, at the San Francisco Conference, the key institution of the Visiting Missions, a proposal which Australia supported.

In that case of *Northern Cameroons* in 1963, Judge Koo had to answer and reject the argument that the terms "recourse to some other means of peaceful settlement does not embrace a settlement by an organ of the United Nations".

To reply to this assertion, Judge Koo observed that Article 33 of the Charter includes resort to "arrangements or other peaceful means", saying:

> "The emphasis here is obviously on the 'peaceful' character of the means to be chosen by the parties for a settlement of their dispute; and no means

> of settlement which fulfills this qualification is precluded . . ." (*I.C.J. Reports 1963*, p. 52).

So Judge Koo concluded that "settlement by the General Assembly is one of the implicitly recognized means. This view is borne out by the record." (*Ibid.*)

In support of a similar conclusion with respect to the action of the Trusteeship Council, Judge Koo recalled a debate in 1946 concerning a Chinese proposal giving a role to the advisory functions of the International Court of Justice in the settlement of disputes between the administering authorities and the administered communities. Judge Koo recalled that:

> "The proposal was withdrawn after it was made clear by the other speakers that settlement of a dispute with the Administering Authority by the Trusteeship Council was not excluded . . . but only that 'this would occur through the normal processes of the Trusteeship System . . .'" (*Ibid.*, p. 52.)

COMMENTS ON PROFESSOR BROWNLIE'S STATEMENT

I will deal with the observations made by Professor Brownlie concerning the preliminary objection based on the reservation of Australia. It was observed in this respect that the Republic of Nauru was not formally in existence as a State before independence, and thus it could not sign a formal treaty with Australia establishing the recourse to other methods of peaceful settlement. Professor Brownlie's concern for documentary evidence, for a formal instrument is, to say the least, surprising, because in his well-known *Principles of Public International Law*, he teaches that in international law "there are no substantive requirements of form" (4th ed., p. 606).

Of course, an agreement may result from the conduct of the parties, as well put in Judge Schwebel's second question.

The answer to his question is yes. The agreement of the parties to have recourse to some other method of peaceful settlement may not only be express, but tacit, and evidenced by their course of conduct. It is agreement by course of conduct that Australia advances in the current case.

It is not disputed that agreements may be express or tacit, they may be written or oral and, in the latter case, agreements may result from a course of conduct.; Article 3 of the Vienna Convention on the Law of Treaties assumes their legal force.

The Partner Governments had ratified the Charter and accepted the Trusteeship Agreement, thus subjecting themselves to the supervisory system of the Charter, which included the recourse, in case of disputes or problems, to the peaceful means of settlement inherent in the Trusteeship regime.

The agreement of the other party, the people of the administered community, to have recourse to those same peaceful means resulted from their invocation and exercise of the rights and benefits provided in their favour by the whole system of supervision established in the Charter and in the Trusteeship Agreement.

By submitting petitions, by receiving visiting missions, by bringing their problems to the Trusteeship Council, by asking for recommendations from the General Assembly, by entering into negotiations with the Administering Authority on the basis of these recommendations, the administered community, the people of Nauru, agreed by their conduct to resort to the procedures of peaceful settlement inherent in the trusteeship system. We further refer in connection with this point to paragraphs 289-291 of our Preliminary Objections.

The fundamental reason why Nauru is not justified in denying the evidence of an agreement to that effect is that its whole case is based on the contention that, before independence, the people of Nauru derived rights from the Charter of the United Nations and consequently assumed corresponding obligations to these rights it involved or exercised.

It would be an untenable position for the Applicant to claim certain rights, as already existing under the mandate and the trusteeship, and at the same time deny all connection with the United Nations system of trusteeship and reject the undeniable fact that the people and the territory of Nauru were placed under a regime of international accountability which subjected them to the supervision and to the procedure of peaceful settlement of the Trusteeship Council and of the General Assembly. It is not possible for the Applicant to deny that the whole system of the United Nations gave to these organs certain powers to decide how the international administration had been conducted and to pronounce on the disputes which arose between the people of the territory and the Administering Authority. As a matter of fact, the whole regime of petitions provided in Article 87, paragraph (*b*), of the United Nations Charter is predicated on the assumption of the existence of rights of the people under Article 80 of the Charter, and before independence, as recognized by this Court in the advisory opinions on *South West Africa* (1950) and on *Namibia* (1971).

And if such a contradictory position is adopted by the adversary, the answer is obvious. One cannot blow hot and cold at the same time ; one cannot claim certain rights resulting from the United Nations Charter while at the same time denying the corresponding obligations, such as the submission to the peaceful procedures derived from the trusteeship system as established in the United Nations Charter. It would be contradictory to claim that the General Assembly had the power to recommend the rehabilitation of the mined areas or to grant independence, while denying agreement to resort to the same mechanism in case of disputes between the administered people and the Administering Authority.

When the Republic of Nauru, on 18 November 1987 became a party to the Statute of the Court, it accepted the provisions of the Statute, an integral part of the Charter (under Article 92 of the Charter), and it accepted all the obligations of a Member of the United Nations under Article 94 of the Charter.

Article 35, paragraph 2, of the Statute of the Court provides that the conditions under which the Court shall be open to other States, such as Nauru, shall be laid down by the political organs of the United Nations, "but in no case shall such conditions place the parties in a position of inequality before the Court".

To claim that Nauru, as such, had accepted no obligations concerning the recourse to peaceful procedures under the trusteeship regime because it was not formally in existence until after independence, to object that it did not sign a formal instrument accepting the obligations of pacific settlement in the Charter, while claiming at the same time that Australia is liable for breaches of the trusteeship regime, would place the Parties to the present dispute in an inadmissible position of inequality before the Court since only one of them, Australia, will be bound by the provisions of the Charter.

With these observations with respect to Professor Brownlie's presentation I hope to have answered also Judge Shahabuddeen's first question.

Mr. President, before leaving the floor I would ask you to be so kind as to give the floor to Professor Bowett for his reply.

REPLY OF MR. BOWETT

COUNSEL FOR THE GOVERNMENT OF AUSTRALIA

Professor BOWETT: Mr. President, Members of the Court, I shall deal with three issues, as succinctly as I can: the absence of any clear allegation of breach by Nauru, the issue of waiver, and the question of the finality of the resolution on termination.

1. THE ABSENCE OF ANY ALLEGATION OF BREACH OF THE TRUSTEESHIP AGREEMENT

During the first round of oral argument I called to the Court's attention the fact that, prior to the termination of the Trusteeship Agreement, Nauru never seems to have alleged that failure to rehabilitate was a breach of that Agreement. The significance of that fact, of course, is that it highlights the absence of the very claim which is the basis of Nauru's Application to this Court.

It is no answer to that point to say that the record shows a clear difference of opinion, pre-1967, as to who should bear the cost of rehabilitating the land mined prior to independence. A difference of opinion is not an allegation of breach of the Trusteeship Agreement. One can imagine many such differences of opinion between the Administering Authority and the people of the Territory during trusteeship. Should new hospitals be built? Is a four-lane highway needed? What should be the curriculum in the schools? And so on. There is enormous scope for differences of opinion under trusteeship, and the Trusteeship Council would doubtless act as arbiter, and recommend a solution or a compromise. But none of this converts a difference of opinion into a claim of breach of the Trusteeship Agreement.

And that is how it was with the difference over rehabilitation. Professor Connell was right in saying it was a disagreement over practicalities. Nauru did not put the matter in terms of breach of the Trusteeship Agreement, nor did Australia deny responsibility in those terms. Indeed, it is fair to say that neither side argued in terms of *legal* responsibility of any kind. Nor did the Davey Committee talk about *legal* responsibility (see Report, p. 26: Nauru Memorial, Vol. 3, Ann. 3). It referred only to a "climate of opinion", a "general trend in regulatory policies" for extractive industries to undertake rehabilitation.

What then was Nauru claiming? Some understanding of the basis of the claim can be gleaned from the statement made by Chief DeRoburt before the Court.

Before turning to that statement, Mr. President, let me make it clear that I raise no question whatsoever as to the integrity and sincerity of Chief DeRoburt. It was a privilege to listen to the testimony of a man who, throughout his life, has given such singular service to his people. However, what he said was:

> "the Nauruan people were all the more determined to obtain acceptance by the Administering Authority of the simple principle that it bears responsibility for rehabilitation of phosphate lands to be mined out during its Administration. This responsibility, the Nauruan Community believe, was moral as well as legal." (CR 91/18, p. 10.)

Now you will note that the responsibility he envisages is that of the Administering Authority, not Australia alone. And it is *moral*, as well as legal.

We can dismiss the moral basis, if only because this is not a court of morals and, if we were to begin debating the morality of the claim, we should venture into areas very far removed from the central question: was an allegation of breach of Trusteeship made?

But let us suppose, for the sake of argument, that the Nauruans believed the claim had a legal basis as well. What was it? Was it to be found in Article 76 of the Charter, or Articles 3 and 5 of the Trusteeship Agreement?

Certainly Chief DeRoburt does not say so. But what of his colleagues? Well, Mr. Keke does not say so either. He makes what I can only describe as an "economic" argument. Specifically, he says:

> "Having enjoyed the abundant benefit of cheap Nauruan phosphate throughout its administration of the Territory, it would be neither fair nor equitable for Australia to abdicate its responsibility to rehabilitate the phosphate lands mined out during its administration . . ." (CR 91/15, p. 28.)

In short, the basis of the claim seems to lie in an argument about economic equity. The idea is that Australia benefited economically from cheap phosphate; therefore, Australia should shoulder the financial burden of rehabilitation. Whatever view one takes of that argument, it has nothing to do with a breach of specific treaty obligations. Indeed, even as an economic argument it seems to depend on the view that the price for phosphate was too low. But scrutiny of the phosphate price was a recurring feature of the Trusteeship Council's supervision and, as I recall, on this issue, too, there was never an allegation of breach, nor a finding of breach.

And I ask the Court to consider carefully the implications of what Mr. Keke is saying. If the responsibility to rehabilitate arose from the cheap price of phosphate, it would follow that there would be no such responsibility if the Administering Authority had paid the fair market price. Accordingly, the task of the Court will be to determine whether, during all those years, a fair price was paid: for if the price *was* fair, there would have been no responsibility to rehabilitate. That is the Nauruan argument, not mine. I confess I do not see an *ex post facto* investigation into the price of phosphate as a task for this Court. The task has clearly been done already by the Trusteeship Council, and it is far removed from an inquiry into breach of Articles 3 and 5 of the Trusteeship Agreement.

Professor Mani repeats the same "economic" argument (CR 91/18, p. 35), and he asks the very pertinent question: "Was the rehabilitation claim any different from an allegation of a breach of a Trusteeship obligation?" (CR 91/18, p. 35.)

What we needed was not the question but, rather, the answer. And, if the argument is simply an economic argument, turning on the price of phosphate, then the answer must surely be "Yes, indeed, it is different"! An economic argument is *not*, on its face, an allegation of breach.

It is true, as both Professor Mani and Professor Brownlie have pointed out, that the Nauruan delegation, in talks with the Partner Governments, made occasional references to Trusteeship obligations. Many of these references were in the context of claims to ownership of the deposits of phosphate, or claims to a greater share of the profits. There is, in 1966, certainly one reference to the Trusteeship system as a *partial* basis of an obligation to rehabilitate (Nauruan Memorial, Vol. 3, Ann. 4, p. 340, Session of 20 June 1966). But this is a reference which cites no provision of the Trusteeship Agreement and which gives no explanation of how an obligation to rehabilitate derives from a particular obligation under the Trusteeship Agreement. In short, the Nauruan reference fell very far short of what the Court has required to constitute a claim or dispute, namely a view "as to the interpretation and application of relevant Articles of the Trusteeship Agreement" (*I.C.J. Reports 1963*, p. 27).

In fact, the only real hint one gets as to the legal basis for the rehabilitation claim comes from the Statement of the Nauruan delegation during the 1967 Talks with the Administering Authority (Nauruan Memorial, Vol. 3, Ann. 5, pp. 140-141). Here it is argued that, in municipal law regulatory systems, such as that in Australia, extractive industries have an obligation to restore mined land. There is not a word about the Trusteeship Agreement imposing similar obligations.

And, of course, as we know, there is no comparable obligation in the Trusteeship Agreement and the Trusteeship Council never construed the Agreement as even *impliedly* imposing such a legal obligation.

So, to conclude on this point, Mr. President, Nauru has, so far, totally failed to demonstrate that there is any basis for a claim of breach of the Trusteeship Agreement. Nauru's claim ought to be summarily dismissed as disclosing no legal dispute. In the language of Article 79 of the Rules, the Nauruan Application ought to be declared inadmissible.

2. THE ISSUE OF WAIVER

Mr. President, I believe it does help to clarify matters if I continue to separate out the question of waiver vis-à-vis the Partner Governments, and waiver vis-à-vis the General Assembly.

As regards the former, the gist of the argument by Professor Mani (CR 91/18, pp. 40-44) is to suggest that there could be no waiver in the 1967 Canberra Agreement, because the two Parties — Nauru and the Partner Governments — had agreed to set the rehabilitation issue aside, so as not to hamper progress. Thus, rehabilitation being set aside, it could not have been waived as part of the Canberra "package deal".

Well, there is clearly nothing wrong with Professor Mani's ingenuity. But there is something drastically wrong with his chronology. The agreement to set aside the rehabilitation issue so as to allow progress to be made on other issues, came in June 1966 — I repeat, June 1966. Professor Mani's citation is from the record of the meeting of 29 June 1966.

But one year later, when all the other issues were virtually settled, the Partner Governments were adamant that the remaining issue of rehabilitation should be tied up and embraced in the "package deal". And so in May of 1967 the Partner Governments pressed for a formal renunciation by the Nauruans of their claim for rehabilitation costs — or at least an understanding that Nauru would not pursue that claim. As I said during the first round of argument, at that stage, in May, Nauru refused.

But this is why the five months *after* May are so important. For between May and the signing of the Canberra Agreement on 14 November 1967, five months later, no more is heard of the Nauruan claim. So, the question is how is this Court to interpret this silence? Is it reasonable to believe the Partner Governments signed the Agreement, knowing that they faced a massive rehabilitation claim? Or is it reasonable to believe that Nauru's silence over this five months induced the Partner Governments to believe that Nauru had quietly dropped its claim and accepted their package offer? My submission is that this second interpretation is the only plausible one. And certainly, by keeping its silence, Nauru made no attempt to correct this view of the Partner Governments. It would have been the easiest thing in the world, at any stage during these five months, for Nauru to say, "Don't forget, we still have our rehabilitation claim". But the terms of the Canberra settlement were too good to lose, so Nauru kept its silence and, in my submission, waived its claim.

Obviously Nauru rejects this interpretation of the negotiations leading up to the Canberra Agreement. But if Nauru is correct, and the issue of financial responsibility remained unresolved by that Agreement (see Professor Brownlie, CR 91/19, p. 79), it became all the more important that the issue should be put to the Assembly, fairly and squarely. For the issue was important, and Nauru says it believed a breach of the Trusteeship Agreement was involved, and that Nauru had alleged such a breach. Logically, therefore, the situation demanded that Nauru should raise it.

What happened, in fact, is already familiar to the Court. Chief DeRoburt mentioned the claim in the Trusteeship Council on 22 November. Not a word was said about this claim by any delegation at that time. On the contrary, the Liberian delegate, in previous years a sponsor of the call for rehabilitation, "commended the Australian Government for its tutelage" (Preliminary Objections of Australia, Vol. II, Ann. 29, para. 56). So, apparently, the claim fell on deaf — or at least unreceptive — ears. The claim was not, in fact, referred to at all by Nauru in the Fourth Committee of the General Assembly on 6 December. Yet Chief DeRoburt has suggested to you that he believed, nonetheless, that this claim was before the General Assembly.

My colleague, Professor Jiménez de Aréchaga, has already explained the fallacy in the reasoning of Chief DeRoburt. The Chief simply assumed that, because his statement of 22 November before the Trusteeship Council was on the record as maintaining the rehabilitation claim, the General Assembly would read that statement into his address to the Fourth Committee on 6 December. Well, that is not how the General Assembly operates. As part of the continuing dialogue in the United Nations, positions change constantly, and the Fourth Committee of the General Assembly was entitled to take his statement on 6 December as it stood.

And, as it stood, he made no allegation of breach, but rather assured them that the problem need not concern the United Nations, because the problem could be solved out of the revenue already received, and due to be received over the next 25 years, thanks to the Canberra Agreement. In my submission, that could only be construed by the Assembly as a waiver, or withdrawal of the claim.

When I put Chief DeRoburt's statement to the Court during the first round, I suggested that "the problem" Chief DeRoburt was referring to, was the whole problem of rehabilitation — and I cited the actual passage from his statement (see CR 91/16, p. 24).

Not so, said Professor Mani (CR 91/18, p. 56). The problem referred to by the Chief, according to Professor Mani, was the problem that the phosphates were a wasting asset.

Mr. President, I will not tax the patience of the Court by analysing the statement by Chief DeRoburt to the Fourth Committee on 6 December 1967, sentence by sentence. The crucial part of the statement is to be found in the records of the Fourth Committee for the 1739th Meeting at paragraph 20 (Preliminary Objections of Australia, Vol. II, Ann. 30). In fact, Chief DeRoburt referred to problems, in the plural. One such problem which he mentioned is clearly the rehabilitation problem. It is true that he mentioned also the fact that the phosphates were a wasting asset and that was a problem — so he identified *two* problems. But then he went on to say that the revenue received by Nauru and to be received over the next 25 years would enable Nauru "to solve the problem".

Which "problem" would the General Assembly reasonably think he was referring to? My submission is that the General Assembly was entitled to believe, and did believe, that he was referring to the problem of rehabilitation. Not only because that was the problem already raised by Nauru in the United Nations, but also because, clearly, that was a problem which could be resolved by money. The other problem — the fact that the phosphates were a wasting asset — was a fact of life. Money could not solve that problem.

So how, reasonably, could the General Assembly construe Chief DeRoburt's statement? Australia submits that there is only one reasonable construction. The General Assembly did *not* treat the claim as a claim of breach and, in any event, believed Nauru was *not* persisting in the claim as an issue relevant to, or arising from, Trusteeship.

I turn now to the third and last issue.

3. THE CONCLUSIVENESS AND FINALITY OF THE TERMINATION OF THE TRUSTEESHIP AGREEMENT BY THE GENERAL ASSEMBLY

On this crucial question, the Parties remain at odds. Australia says the Assembly was fully aware of the earlier difference of opinion over rehabilitation but, knowing the terms of the Canberra Agreement, knowing also the recommendation of the Davey Report and having heard Chief DeRoburt's assurance that the problem could be dealt with by Nauru — after independence — and need not concern the United Nations, the Assembly made no finding of breach against the Partner Governments; and that was conclusive.

Nauru argues, through my colleague Professor Brownlie, that the failure of Nauru to specifically allege a breach is legally irrelevant (CR 91/19, p. 63). The reasoning appears to be that the Assembly knew of the Nauruan claims, that the Assembly must have construed these claims as *legal* claims and that, therefore, the Assembly must have construed these legal claims as involving an allegation of breach of Trusteeship.

As I have already suggested, there is scope for many, many differences between the Administering Authority and the administered people of the territory over the *means* adopted to carry out the substantive obligations of Trusteeship. But you simply cannot equate every difference of opinion with an allegation of breach.

Setting this aside, how does it improve Nauru's position if they are right? Let us accept, for the sake of argument, the Nauruan view that Nauru had, in effect, alleged breach of the Trusteeship Agreement and that the Assembly dealt with the problem in this light. How does that help Nauru?

Nauru's argument, as developed principally by my friend Professor Crawford, is this:

First. Nauru alleged a breach of the Trusteeship Agreement, specifically on 22 November in the Trusteeship Council;

Second. On the same day, Nauru invited the Trusteeship Council *not* to decide the issue of breach, but rather to leave this to bilateral negotiations with the Partner Governments *after* independence;

Third. Since the General Assembly was exclusively competent only as regards disputes expressly referred to it, Nauru remained free to pursue its claims after independence.

Now, clearly, the core of the Nauruan argument lies in the assumption that, faced with an allegation of breach, the General Assembly could decline to resolve the dispute. Put in other terms, the basic objectives of the trusteeship system, as set out in Article 76 of the United Nations Charter, and the implementation of the specific legal obligations assumed under the Trusteeship Agreements, can properly be left to bilateral negotiations between the Administering Authority and the administered people. It is *not* the obligation of the Assembly to oversee, and ensure, compliance.

Mr. President, I find this view of Chapter XII of the United Nations Charter unrecognizable. Such an abdication of responsibility is simply incompatible with the whole elaborate system of supervision. And it would be a true abdication of responsibility, for there would be no other independent third party which could guarantee performance of the trust.

If the abdication by the Assembly occurred during trusteeship, the people of the territory would lack *locus standi* to come before this Court, or to insist on arbitration. And if the abdication occurred at the termination of the trusteeship the situation would be little better. The newly-independent community's chances of a third party ruling would depend upon the pure chance that this Court *might* have jurisdiction.

So I would argue that such an abdication of responsibility by the Assembly cannot be presumed. And it is clear that the Nauruan case is pure presumption. For it is clear that resolution 2347 (XXII) contained no finding of breach and *no* decision that there was an outstanding question of legal responsibility for rehabilitation, and *no* decision to leave such question for future, bilateral negotiations. So it is all pure presumption and, in my submission, an unacceptable presumption, if only because it implies abandonment by the Assembly of its responsibilities. The fact is that, in the entire history of trusteeship, we have no such example of the Assembly abandoning its responsibilities in this way; not one example of the Assembly leaving an allegation of breach to be resolved bilaterally after independence.

The safer, and sounder, interpretation of that termination resolution is that offered by Australia. That, given the Assembly's knowledge of the Davey Committee Report, of the Canberra Agreement, of the Trusteeship Council's refusal to re-endorse the recommendation on rehabilitation, of Chief DeRoburt's statement on 6 December — the resolution can only be properly interpreted as a full and final discharge of the Partner Governments from their responsibilities.

It is difficult to imagine the Assembly terminating the Agreement without terminating questions of liability for the performance of that Agreement. One would have thought that such questions were, *par excellence*, questions "necessarily arising in the course of such functions as the termination or revocation of trusteeship agreements" — I use Professor Crawford's own words to describe a category of which the Assembly clearly *was* competent (CR 91/20, p. 31). The talk of "survival of rights" or "reducing the Court to a subsidiary role", entirely misses the point. The United Nations Charter entrusted the safeguarding of those rights to the Assembly. If the Assembly abdicated its responsibilities there could be no guarantee of survival of rights, and no guarantee that this Court would have any role.

Unhappily, Mr. President, that is not quite the end of the matter, because Nauru argues that Australia has obligations both under the Trusteeship Agreement *and* under general international law. Conceivably, therefore, we may yet hear the argument that, even if the Assembly's resolution on termination was final and conclusive as to the Trusteeship obligations, this would not be so as regards the obligations under general international law — specifically those relating to self-determination, permanent sovereignty, denial of justice and abuse of rights.

So forgive me if I digress for a few moments to deal with this argument. As already indicated, Australia does not believe that the Administering Authority faced two, parallel but distinct, sets of legal obligations — one under the Trusteeship Agreement, the other under general international law. The true position was that *the* operative obligations were those in the Trusteeship Agreement. Obviously, in interpreting and applying those obligations the General Assembly would have in mind the United Nations Charter as a whole and evolving general principles of international law. It would be unthinkable for the United Nations General Assembly to ignore those principles, especially principles like permanent sovereignty and self-determination, which the Assembly itself has fostered. So, on this point I agree entirely with Professor Crawford : we interpret the Court's jurisprudence in the *Namibia, Western Sahara*, and *Nicaragua* cases in exactly the same way (CR 91/20, p. 29).

But it must follow from this that the Assembly's final act of termination, if it was dispositive, was dispositive and conclusive as to all applicable legal principles, not simply the provisions of the Trusteeship Agreement viewed in isolation.

If the situation were otherwise it would be incomplete, and unfair. For if the General Assembly could not, during the trusteeship, deal with applicable legal principles outside the Trusteeship Agreement *stricto sensu*, who could? Not the Court, certainly, because pre-independence Nauru would have no *locus standi*. So these other legal principles would be unenforceable during trusteeship. Mr. President, the notion has only to be stated to be dismissed. It is unthinkable that the Trusteeship should be governed by legal principles which cannot be enforced during the currency of the trusteeship.

Mr. President, that concludes my statement. I am sure you would wish to call on Mr. Pellet after the break.

The Court adjourned from 11.35 to 11.50 a.m.

RÉPLIQUE DE M. PELLET

CONSEIL DU GOUVERNEMENT DE L'AUSTRALIE

M. PELLET : Monsieur le Président, Messieurs de la Cour.

1. Il me revient de répondre aux arguments par lesquels Nauru entend écarter l'exception préliminaire de l'Australie concernant l'incompatibilité de sa requête avec le principe du consentement à la juridiction internationale.

Ceci me conduit à traiter principalement de la plaidoirie prononcée par mon collègue et néanmoins ami, selon la formule consacrée, le professeur Crawford, mardi dernier. Principalement, mais pas exclusivement, puisque d'autres conseils de Nauru ont abordé la question peut-être d'ailleurs sans qu'ils en soient tout à fait conscients.

2. Monsieur le Président, en écoutant M. Crawford, j'ai constaté avec intérêt, et, parfois, avec un certain étonnement, que les deux Parties étaient en réalité d'accord sur un certain nombre de points fondamentaux et, pour éviter des polémiques inutiles, je souhaite énumérer d'emblée les plus importants de ces points. Il s'agit en particulier :

— de la non-transposabilité de principe des règles des droits internes en matière de responsabilité dans la sphère internationale (cf. CR 91/20, p. 87-88) ;
— du fait que les British Phosphate Commissioners relèvent de la responsabilité conjointe et égale des trois gouvernements participants (cf. CR 91/20, p. 82 ; voir aussi p. 84) ;
— de l'absence de personnalité juridique de l'autorité administrante en tant que sujet de droit distinct des trois Etats qui la composent (cf. CR 91/20, p. 63) ;
— ou même de la définition de base de la règle que Nauru persiste à appeler des « parties indispensables », mais en en donnant cette fois une définition qui ne caricature pas — ou, en tout cas, caricature moins... — l'exception préliminaire de l'Australie, puisque les deux Parties s'accordent pour admettre qu'il ne suffit pas que des Etats qui ne sont pas présents à l'instance soient intéressés par l'arrêt que la Cour est appelée à rendre (« implicated in the decision » — CR 91/20, p. 59 ; voir aussi page 68), pour que la Cour soit incompétente.

3. Ceci étant, dire que l'Australie et Nauru sont d'accord sur ces prémisses importantes ne signifie pas, loin de là malheureusement, que les deux Parties en tirent les mêmes conclusions.

Je vais m'employer à le montrer en abordant successivement les questions suivantes, qui me paraissent constituer les principaux points de désaccord entre les Parties et qui portent

1. d'abord sur la définition même du problème qu'il appartient à la Cour de trancher à ce stade ;
2. ensuite sur l'existence de parties au différend qui ne sont pas présentes à la présente instance ;
3. en troisième lieu, j'aborderai le problème de la prétendue prédominance de l'Australie ; et enfin
4. je m'intéresserai à l'incidence que peut avoir en l'espèce le droit de la responsabilité internationale ;

et je conclurai en disant un mot des conséquences qu'aura, pour Nauru, un arrêt de la Cour faisant droit aux exceptions préliminaires soulevées par l'Australie.

1. LA DÉFINITION DES QUESTIONS POSÉES À LA COUR AU STADE ACTUEL

4. Depuis le dépôt de la requête, j'ai toujours, je dois dire, été très perplexe sur les conclusions mêmes de Nauru et cette perplexité s'est accrue à la lecture de son exposé écrit et à l'audition des plaidoiries orales faites en son nom. D'une part en effet, on ne sait pas très bien quelles violations Nauru impute à l'Australie, et la violation de quelles règles précisément ; et, d'autre part, l'Etat requérant semble éprouver quelque difficulté à faire le partage entre ce qui concerne le fond et ce qui relève de la présente phase du litige — à moins que Nauru s'emploie à dessein à faire l'amalgame, avec l'espoir d'égarer la Cour et de la conduire à déclarer que les exceptions australiennes n'ont pas un caractère exclusivement préliminaire.

Il faut pourtant distinguer. Et on peut le faire ; même si, bien évidemment, les deux aspects ne sont pas dépourvus de tout lien l'un avec l'autre.

Dans sa requête, Nauru demande à la Cour un certain nombre de choses que pour simplifier on peut je crois résumer ainsi : l'Australie est-elle responsable — j'ajouterai : est-elle responsable seule ? — de manquements aux obligations de la tutelle en matière d'exploitation des phosphates et doit-elle réparer les dommages éventuels en résultant ? Ceci, Monsieur le Président, c'est la question qui se pose au fond et que les conseils de Nauru ont d'ailleurs longuement abordée lors de leurs plaidoiries. Mais ce n'est pas la question qui se pose à ce stade.

Il ne s'agit pour l'instant nullement de savoir si l'Australie a commis une violation des obligations lui incombant, comme M. Crawford et ses collègues semblent le penser (cf. CR 91/20, p. 86) mais de déterminer si la Cour peut ou ne peut pas répondre à une telle question.

Pour ce travail « préliminaire », peu importe, à vrai dire, que la Cour doive se livrer à « a detailed examination of the basis of the claim and of all the relevant facts », comme l'a dit le conseil de Nauru (CR 91/20, p. 91). Ainsi que l'a rappelé tout à l'heure le professeur Jiménez de Aréchaga, le critère de distinction entre ce qui est exclusivement préliminaire et ce qui touche au fond « tient à ce que la Cour ne saurait, dans sa décision [sur une exception préliminaire], préjuger en rien de sa décision future sur le fond » *(Certains intérêts allemands en Haute-Silésie polonaise, compétence, arrêt n° 6, 1925, C.P.J.I. série A n° 6)*.

Or, en l'espèce, la Cour n'a nul besoin de dire si, oui ou non, l'Australie est responsable et doit réparation, pour constater justement qu'elle ne peut pas trancher cette question, qui, je le rappelle, constitue la question de fond. Car, pour ce faire, dans l'un ou l'autre sens, la Cour devrait se prononcer sur la responsabilité de la Nouvelle-Zélande et du Royaume-Uni

i) en même temps qu'elle se prononcerait sur la responsabilité de l'Australie et
ii) avant de déterminer la réparation éventuelle due par ce dernier pays.

Dans les deux cas, la Cour jugerait des Etats absents sans leur consentement. La thèse de l'Australie, Monsieur le Président, n'est pas plus compliquée que cela. Et ceci me conduit au deuxième temps de mon raisonnement. Il tient en une constatation.

2. CERTAINES PARTIES AU DIFFÉREND QUE CONSTITUE NOTRE AFFAIRE NE SONT PAS PRÉSENTES À L'INSTANCE

5. Si la Cour en venait à se prononcer au fond, ces parties absentes seraient donc jugées sans avoir consenti à sa juridiction.

Pour que ceci soit exact, il faut évidemment que ces deux Etats, la Nouvelle-Zélande et le Royaume-Uni, puissent, à bon droit, être qualifiés de parties au différend.

Je l'avais montré, je crois, la semaine dernière en établissant que, dans la sphère internationale, l'Australie n'est jamais apparue seule, elle n'est apparue qu'en tant que composante de l'autorité administrante. Je n'ai pas, apparemment, complètement convaincu le professeur Crawford — cela ne m'étonne pas outre mesure d'ailleurs... — qui semble conserver un doute sur ce point et qui a fait valoir que l'autorité administrante n'avait pas de personnalité juridique qui lui fût propre (cf. CR 91/20, p. 63); que, dès lors, cette « non-entité » ne pouvait pas encourir de responsabilité propre *(ibid.)*; et que, donc, toute possibilité de trouver un responsable s'évanouirait (*ibid.* et CR 91/20, p. 77).

L'Australie, je l'ai dit, ne prétend nullement que l'autorité administrante ait une personnalité juridique. Elle est constituée par l'addition des trois « gouvernements participants ». Mais cette addition n'est pas fortuite; elle est juridiquement organisée; elle est consacrée par des accords internationaux solennels et qui sont au cœur du litige: le mandat et l'accord de tutelle qui, tous deux, établissent cette « conjonction».

Le conseil de Nauru a d'ailleurs donné une définition tout à fait acceptable de ce phénomène lorsqu'il a dit qu'il s'agissait d'un

> « particular arrangement which involved a degree of participation on the part of the other two States, a device for associating the United Kingdom and New Zealand in the administration of Nauru » (CR 91/20, p. 64).

Nauru peut peut-être prétendre — et elle le fait fréquemment — que les accords que concluent entre eux les trois gouvernements ne lui sont pas opposables; mais elle ne peut certainement pas dire la même chose pour le mandat et pour l'accord de tutelle — faute de quoi ce serait le fondement même de sa requête qui disparaîtrait. Or, ces traités visent bien l'autorité administrante, les trois Etats, pas l'Australie.

Je ne vais pas m'y attarder trop longuement — j'ai parlé longuement de ceci la semaine dernière. Mais il est révélateur que Nauru fuie le débat sur ce point. Elle rappelle, en passant, que l'Australie voulait se réserver le mandat puis la tutelle sur Nauru (cf. CR 91/19, p. 18, et CR 91/20, p. 73); mais Nauru se garde bien de pousser plus avant le raisonnement et de constater que l'Australie n'a pas eu gain de cause et que le mandat a été confié, finalement, à « Sa Majesté britannique », la tutelle aux trois gouvernements. Il est significatif que Nauru « oublie » complètement que le contrôle, de la Société des Nations puis des Nations Unies, s'exerce non pas sur l'Australie, mais sur « l'autorité administrante »; il est significatif aussi que Nauru tente de faire croire le contraire lorsque son conseil affirme que « Both the League of Nations and the United Nations expressed concern that the Australian administration of Nauru was improper » (CR 91/20, p. 83). Mais c'est faux, Monsieur le Président! Sauf erreur de ma part, jamais, ni la Société des Nations ni l'Organisation des Nations Unies n'ont visé l'Australie, si ce n'est en relation avec les deux autres gouvernements: si les Nations Unies ont donné *quitus*, c'est à eux trois qu'elles l'ont donné; si elles l'ont refusé — mais mes éminents collègues MM. Bowett et Jiménez de Aréchaga ont montré qu'elles ne l'ont pas refusé —, si donc, cependant, elles l'avaient refusé, c'est à eux trois qu'elles l'auraient refusé.

6. Et M. Crawford de s'étonner: comment ce « non-sujet » de droit qu'est l'autorité administrante peut-il cependant exister?

> « How can there be « purely internal » relations between three distinct international persons relating to the discharge of international responsi-

> bilities imposed by a paramount instrument, the Charter?» (CR 91/20, p. 76-77.)

Mais pour une raison toute simple, Monsieur le Président : parce que le mandat puis la Charte justement condamnent ces Etats à agir ensemble aux fins de la tutelle. D'ailleurs, serait-il raisonnable de prétendre que des Etats membres d'une confédération par exemple — qui n'est pas davantage un sujet du droit international — n'ont pas de rapports particuliers *inter se*, des rapports non pas «internes» mais, comme je l'avais dit, des rapports «endogènes» (cf. CR 91/16, p. 67) — destinés à organiser leurs relations entre eux sans, pour autant, que rien en soit changé quant à leurs rapports avec les tiers.

Mais, en l'occurrence, on doit aller plus loin : l'article 4 de l'accord de tutelle «incorpore» dans celui-ci non seulement l'accord de 1919-1923, mais aussi, par avance, les modifications que les trois gouvernements viendraient à y apporter. Et ceci nous fait faire un pas de plus : non seulement les trois Etats ont des rapports *inter se*, mais encore, quoi qu'en puisse penser Nauru (cf. mémoire, par. 241 et 421 ; exposé écrit, par. 297, 305-309, etc.), ces arrangements, qui sont consacrés par l'accord de tutelle, lui sont bien opposables. Il ne s'agit pas, contrairement à ce qu'affirme Nauru (cf. CR 91/20, p. 74), de reconnaître «the special position of one of the three States» ; il s'agit, au contraire, de dire que ce que décident, librement, les trois gouvernements dans leurs rapports entre eux et qu'ils peuvent, librement aussi, modifier, ne change rien à la conjonction dont l'accord de tutelle (et non pas les trois gouvernements) pose le principe.

En d'autres termes, les trois gouvernements peuvent décider de tout ce qu'ils veulent entre eux, de confier l'administration de l'île à un triumvirat égalitaire (comme ils l'ont fait en matière économique avec les BPC) ou d'y envoyer un proconsul unique, entièrement soumis aux instructions d'un seul d'entre eux (comme Nauru affirme — à tort d'ailleurs — qu'ils l'ont fait pour l'administration générale). Cela ne change rien à l'affaire : c'est «l'autorité chargée de l'administration» — donc les trois gouvernements, conjointement —, qui «répondra» au plan international «de la paix, de l'ordre, de la bonne administration et de la défense du territoire», comme le dit l'article 4 de l'accord de tutelle qui ne voit dans l'arrangement conclu entre les trois pays qu'un moyen — précaire et modifiable librement — pour atteindre ces fins. Etant entendu d'ailleurs que, par contre, l'hypothèse imaginée par le professeur Crawford, selon laquelle les trois partenaires auraient confié l'administration au jour le jour à un quatrième Etat (CR 91/20, p. 71), n'est pas recevable : elle est exclue par une interprétation formelle, insérée à la demande de l'Inde dans le rapport sur le projet d'accord de tutelle, interprétation aux termes de laquelle il était entendu que les trois gouvernements participants devaient rester seuls concernés (cf. A/402, rev. 1, 21 octobre 1947, p. 2-3, et A/420, 27 octobre 1947, p. 2). Et ceci n'est pas sans importance : les Nations Unies veulent bien que les trois gouvernements s'organisent comme ils l'entendent — mais elles tiennent à n'avoir à faire qu'à eux, qu'à l'autorité administrante, qui seule importe aux yeux des Nations Unies.

J'ai dit, mardi dernier (CR 91/16, p. 66), que les deux partenaires de l'Australie au sein de l'autorité administrante avaient constamment non seulement assumé, mais revendiqué expressément leur part de responsabilité dans la mise en œuvre de la tutelle.

Mais supposons un instant que tel n'ait pas été le cas. Que le Royaume-Uni ou la Nouvelle-Zélande, ou les deux, aient déclaré devant le Conseil de tutelle, ou l'Assemblée générale, n'avoir, dans cette affaire, aucune part de responsabilité. Est-il concevable que ces organes des Nations Unies se fussent inclinés ? Peut-on imaginer un instant qu'ils eussent accepté cette violation flagrante de l'accord de tutelle et de l'article 81 de la Charte? Evidemment non : ils auraient vivement réagi pour faire respecter le droit — comme la Cour, dont c'est la mission, ne peut, pour sa part, manquer de réagir face à cette mise à l'écart du droit des Nations Unies à laquelle, insidieusement mais clairement, Nauru lui demande de procéder.

Car il est très apparent, Monsieur le Président, que la fin de la tutelle ne modifie pas les données du problème. Le conseil de Nauru le voudrait bien, qui, à la fin de son exposé, affirmait mardi que « there is no reason to think that after its termination [il parlait de la cessation de la tutelle] a requirement of joint and inseparable proceedings for liability should be imposed » (CR 91/20, p. 94-95). Certes, la tutelle a cessé — mais si l'Australie (ou les trois gouvernements) devai(en)t voir sa (ou leur) responsabilité engagée, ce ne pourrait être que pour un manquement aux obligations qui en auraient découlé. Certes, l'autorité administrante a disparu avec la tutelle — mais, comme Nauru le répète à l'envi, cette autorité administrante n'avait pas de personnalité juridique et il n'est ni plus ni moins compliqué aujourd'hui de rechercher la responsabilité des trois Etats que ce l'eût été avant 1968 — à un moment, je le redis, où il est tout à fait impensable que les organes de contrôle (ou la Cour, si elle avait été saisie) auraient pu imaginer que l'un des trois gouvernements aurait pu engager sa responsabilité indépendamment des autres.

8. Il n'en aurait pu aller autrement que dans un seul cas de figure : si l'Australie, en tant qu'administrateur représentant sur le terrain les deux autres gouvernements, ne s'était pas, à leurs yeux — aux yeux de la Nouvelle-Zélande et du Royaume-Uni —, acquittée convenablement de ses obligations de représentant et si la Nouvelle-Zélande ou le Royaume-Uni avaient porté l'affaire au plan international. Dans cette hypothèse, en effet, ces deux Etats — mais eux seuls — auraient été en droit de se plaindre non pas du non-respect des obligations de tutelle en tant que telles, mais de la violation des obligations particulières que l'Australie assumait à leur égard.

Et M. Crawford n'a qu'à moitié raison sur ce point lorsqu'il affirme que l'Australie « may have acted on behalf of the other two States, but it could not have acted on behalf of itself » (CR 91/20, p. 70 ; voir aussi p. 71). C'est oublier les intuitions fulgurantes de Georges Scelle et la notion de « dédoublement fonctionnel » — c'est-à-dire l'idée qu'un Etat peut agir au plan international non seulement pour lui-même, mais aussi au nom de *(on behalf of)* la communauté internationale. Ici l'Australie agissait à la fois en tant qu'Etat participant à l'autorité administrante et comme agent exécutant de cette autorité administrante. Dans le premier cas, les responsabilités de l'Australie étaient « primaires » pour reprendre le vocabulaire de M. Crawford ; elles étaient « dérivées » dans le second (voir par exemple CR 91/20, p. 85).

Dans toute la mesure où l'Australie a agi en tant que représentant de l'autorité administrante, elle ne pouvait — et elle ne peut aujourd'hui — être poursuivie que par les membres de celle-ci ; et, comme il y a peu de chance que l'Australie se poursuive elle-même, seuls la Nouvelle-Zélande et le Royaume-Uni peuvent agir. Mais pas Nauru. Dans la mesure au contraire où l'Australie est tenue pour responsable en tant qu'Etat participant à l'autorité administrante, sa responsabilité peut être mise en cause par n'importe quel membre de la communauté internationale (en admettant que les autres conditions nécessaires soient réunies), Nauru, évidemment incluse, mais dans ce cas l'Australie ne peut être poursuivie qu'avec ses deux partenaires.

9. Ceci est décisif, Monsieur le Président.

Ceci est suffisant.

Je ne veux, cependant, pas donner l'impression de vouloir esquiver le débat, même s'il est parfaitement inutile, dans lequel mon adroit contradicteur a voulu m'entraîner.

Et je vais donc dire un mot d'un troisième point qui concerne

3. LA PRÉTENDUE PRÉDOMINANCE DE L'AUSTRALIE ET SES CONSÉQUENCES SUPPOSÉES

10. La thèse australienne sur ce point se décompose à son tour en deux propositions

1) la prédominance de l'Australie, complaisamment présentée par M. Crawford, ne correspond nullement à la réalité, en tout cas dans le domaine faisant l'objet du différend soumis à la Cour (c'est la première proposition australienne); et
2) quand bien même prédominance il y aurait, elle n'aurait aucun impact sur le sort de l'exception préliminaire qui nous retient (c'est la seconde proposition australienne).

11. Première proposition donc : «il n'y a pas de prédominance».

Je sais bien qu'après le tableau, très caravagesque, qu'a brossé mardi le conseil de Nauru, où l'omniprésence australienne contrastait fortement avec l'absence totale de ses deux partenaires, cette affirmation peut paraître relever d'un goût excessif pour la provocation — goût que l'on me prêterait tout à fait à tort...

Mais j'ai écouté attentivement M. Crawford, j'ai lu et relu le compte rendu de son intervention ; et je n'y ai pas trouvé la démonstration contraire. Certes, mon savant collègue insiste longuement sur le fait que l'Australie est sur le terrain et qu'elle administre «au jour le jour» (même si l'expression ne lui convient pas, c'est pourtant bien ce qu'elle fait) et, sur cela, nous sommes d'accord ; je l'avais souligné aussi, la semaine dernière (cf. CR 91/16, p. 56). Mais il oublie de rappeler non seulement que cette prédominance n'est que le résultat d'une délégation de l'autorité administrante — je n'y reviens pas —, mais aussi et surtout qu'elle existe, peut-être, dans tous les domaines, sauf un : celui qui nous intéresse ; celui de l'exploitation des phosphates.

Si, comme on nous l'affirme (cf. CR 91/18, p. 60), le fondement de l'obligation de remise en état trouve sa source dans les usages en vigueur dans l'industrie extractive et minière, il est clair que c'est d'abord aux BPC qu'il incombait de s'acquitter de cette prétendue obligation. Maintenant admettons qu'ils ne se soient pas acquittés de cette obligation ; c'est très évidemment alors aux trois gouvernements qu'il appartient de se substituer aux BPC défaillants. Peu importe la prétendue suprématie que l'Australie pouvait exercer par ailleurs : cette prétendue prédominance cessait de toute façon là où commençaient à intervenir les BPC que les trois gouvernements contrôlaient ensemble, également, sans prédominance de l'un d'entre eux. Au fond, la prédominance, si prédominance il y a, cesse au seuil de notre affaire.

Le conseil de Nauru sait bien d'ailleurs que ceci menace d'écroulement sa belle construction et il tente d'en affermir les fondations en affirmant que ce n'est pas contre les BPC que Nauru en a, mais contre l'Australie qui ne les aurait pas empêchés d'agir (cf. CR 91/20, p. 83). Mais c'est, ici encore, oublier une chose à vrai dire tout à fait fondamentale : l'Australie, en tout cas l'Australie seule, ne pouvait pas empêcher les BPC d'agir. Cela lui était interdit par l'article 13 de l'accord de 1919 dont — et c'est très révélateur — M. Crawford n'a pas soufflé un mot alors que je m'y étais moi-même arrêté longuement dans ma première plaidoirie (voir CR 91/16, p. 59, et CR 91/17, p. 9). Je peux donc me borner à rappeler qu'en vertu de cette disposition tout ce qui concerne l'exploitation des phosphates est réservé aux BPC et que, dès lors, les trois gouvernements ne peuvent intervenir individuellement dans ce domaine.

On peut même se demander si cet article 13 n'est pas au centre d'un véritable marché de dupe pour l'Australie : la Nouvelle-Zélande et le Royaume-Uni se déchargent sur elle du soin de l'administration au quotidien ; mais ils veillent jalousement à ne laisser à ce pays aucune prédominance d'aucune sorte pour ce qui touche aux phosphates, la question qui, par excellence, les intéresse ... celle qui, par excellence aussi, nous intéresse ici...

Et ce sont en effet les BPC — les BPC, seuls — qui exploitent (qui « dévastent », dirait Nauru...). Les BPC qui, comme l'admet M. Macdonald lui-même dans un passage cité pourtant à la fois par M. Connell (CR 91/19, p. 18) et par M. Crawford (CR 91/20, p. 76), ont la haute main sur tout ce qui concerne le phosphate (*op. cit.*, p. 21), ce qu'ont constaté aussi toutes les missions de visite des Nations Unies — les BPC, enfin, qui sont l'émanation des trois gouvernements.

C'est pourquoi d'ailleurs la question de la remise en état a toujours été considérée comme relevant de la commune responsabilité de ces trois gouvernements. L'offre de réinstallation a été faite en leur nom commun (voir exceptions préliminaires, p. 30). Le financement de cette entreprise devait être assumé conjointement par eux (voir *ibid.*, p. 31). Même chose s'agissant de la remise en état à proprement parler. En 1965, le refus d'y procéder a été exprimé au nom des gouvernements participants (« on behalf of the Partner Governments » — *ibid.*, p. 39), position qui fut maintenue par la délégation conjointe en 1966 (*ibid.*, p. 42) et, à nouveau, en 1967 à la suite du rapport de la commission Davey (*ibid.*, p. 45).

Sur ce problème, Monsieur le Président, le seul qui importe dans le cadre de notre affaire, les faits parlent d'eux-mêmes : la responsabilité des trois Etats est conjointe et assumée conjointement. Et l'on voit mal au nom de quelle logique l'Australie serait tenue à réparation.

Car quand bien même, il y aurait, comme l'affirme Nauru, « prédominance » australienne — ce qui, je le répète, est inexact en tout cas dans notre domaine —, prédominance de toute façon ne signifie pas « exclusivité ». Et personne, pas même M. Crawford, ne prétend le contraire. Je sais bien qu'il décrit, avec humour, l'Australie en empereur romain. Mais l'image est excessive, Hughes ou Garran, Pope ou McPherson, ces hommes qui ont marqué l'histoire de Nauru du côté australien, ne sont pas des « Auguste » des temps modernes — ou alors, Auguste peut-être, mais à l'époque où il n'était qu'Octave et où il partageait le pouvoir avec Antoine et Lépide ! Des Auguste du temps du triumvirat !...

12. En termes moins imagés, et c'est ma seconde proposition, l'improbable prédominance australienne n'a pas, et ne peut pas avoir, d'effets juridiques à ce stade.

Elle pourrait en avoir, si les trois Etats étaient présents dans cette salle et si la Cour avait constaté leur responsabilité conjointe, et ceci au moment où se poserait le problème de la réparation, de l'éventuelle indemnité à laquelle prétend Nauru. Mais pour cela, Monsieur le Président, il faudrait d'abord que la Cour ait pris position sur le principe même de la responsabilité des trois Etats ; or, à cette fin, que l'Australie soit responsable à 20%, 33%, 50%, ou 80% est sans aucune pertinence ; quand bien même on est responsable « à 1% », le fait demeure : on est responsable. Participant à l'autorité administrante et aux BPC conjointement avec l'Australie, la Nouvelle-Zélande et le Royaume-Uni sont responsables au même titre qu'elle — ce n'est pas un problème quantitatif — et « indissociablement » — si responsabilité il y a, bien sûr. Quelle que soit donc la clé de répartition qui serait retenue pour la réparation éventuellement due à Nauru, la Cour, si elle se prononçait au fond, ne pourrait éviter de se prononcer sur les « intérêts juridiques » (« legal interests ») de ces deux Etats. Et quoi qu'en ait dit le conseil de Nauru nous sommes bien dans le cadre de la jurisprudence de l'*Or monétaire* en ce sens que ces Etats seraient jugés sans avoir consenti à la juridiction de la Cour.

13. L'heure n'est plus à savantes discussions sur la portée de la règle que, par commodité, l'on peut appeler des « parties indispensables » dès lors qu'on assimile cette règle au principe du consentement à la juridiction internationale. Il est cependant nécessaire de revenir un très bref instant sur ce qui paraît erroné dans la présentation qu'en a faite M. Crawford.

J'ai relevé trois aspects :

i) Pour important qu'il soit, l'arrêt de 1954 ne constitue pas l'unique précédent à l'occasion duquel la Cour a fait une application positive du principe (voir CR 91/20, p. 68) ; il constitue en effet le *ratio decidendi* de l'avis consultatif rendu en 1923 par la Cour permanente dans l'affaire du *Statut de la Carélie orientale* (*C.P.J.I. série B n° 5*, p. 27-28).

ii) La simultanéité. J'avais indiqué, lors du premier tour de plaidoirie qu'à première vue un prononcé judiciaire obligerait la Cour à se prononcer simultanément sur les responsabilités des trois Etats alors que, dans l'affaire de l'*Or monétaire*, la détermination de la responsabilité de l'Albanie eût été un préalable à l'examen du différend (CR 91/17, p. 44). Le conseil de Nauru s'est « emparé » de cette constatation pour affirmer que « as decisions such as the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* show, simultaneity, is not enough » (CR 91/20, p. 69). En premier lieu, telle n'est pas du tout la portée de l'arrêt de 1984, qui est fondé, vous le savez mieux que moi, sur une tout autre constatation : l'existence d'une pluralité de différends. En deuxième lieu, je me permets de rappeler à mon collègue que j'avais été plus loin dans le raisonnement qu'il me prête et que j'avais montré que la différence (simultanéité contre préalable) n'était qu'apparente (CR 91/17, p. 45). Enfin et surtout, je vois mal ce que cela change : le problème n'est pas de savoir si la Cour devrait se prononcer d'abord ou en même temps que sur ceux de Nauru et de l'Australie sur les intérêts juridiques de la Nouvelle-Zélande et du Royaume-Uni, mais si elle peut éviter de le faire à un moment quelconque. Or, sous quelque angle que l'on prenne le problème, la Cour ne peut pas éviter cela.

iii) Et enfin, Nauru, qui affectionne particulièrement l'arrêt de la Chambre de la Cour du 13 septembre 1990 dans l'affaire du *Différend frontalier terrestre, insulaire et maritime (El Salvador/Honduras)*, l'interprète de manière fort discutable (voir CR 91/20, p. 67-68 et 94). M. Crawford a certes cité des extraits pertinents de cette décision *(ibid.)* mais en omettant un passage qui leur donne tout leur sens. J'ajoute donc ce passage :

> « Si le Nicaragua est autorisé à intervenir, l'arrêt que rendra la Chambre ne déclarera pas, pour ce qui est des rapports entre cet Etat et les deux autres, que le Nicaragua possède ou ne possède pas ... de droits découlant du *condominium*... » (*C.I.J. Recueil 1990*, p. 122.)

C'est très important. Il n'est pas besoin d'être grand clerc pour constater que la situation est toute différente dans notre affaire : si la Cour devait accueillir la requête de Nauru, elle déclarerait « pour ce qui est des rapports entre cet Etat et les trois autres » — la Nouvelle-Zélande et le Royaume-Uni inclus — que ces deux derniers Etats ont engagé (ou n'ont pas engagé) leur responsabilité à son égard du fait qu'en tant que membres de l'autorité administrante ils auraient, ou non, violé les obligations découlant pour eux, au même titre que pour l'Australie, de la tutelle.

14. D'ailleurs, Monsieur le Président, Nauru sait très bien que l'Australie n'est pas le responsable unique des préjudices qu'elle invoque.

J'ai montré dans mon précédent exposé que la requête et le mémoire de Nauru faisaient, en réalité, des trois gouvernements regroupés au sein de l'autorité administrante, les véritables destinataires conjoints de ses demandes (voir CR 91/17, p. 21-26). Son conseil ne m'a pas démenti sur ce point, sinon pour affirmer que la Cour doit prendre les conclusions de l'Etat demandeur « au premier degré » sans se préoccuper du but réellement poursuivi (CR 91/20, p. 93-94), ce qui est à contre-courant de la jurisprudence tout à fait claire de la Cour.

Mais, surtout, il est intéressant de voir que tous les conseils de Nauru, et l'agent lui-même, ont, avec une belle unanimité, confirmé ce que les écritures de ce pays montraient déjà de manière éclatante.

Je pense, par exemple

— à la présentation de M. DeRoburt qui a parlé abondamment des positions prises par l'« autorité administrante » ou les « trois gouvernements » lors des négociations auxquelles il a pris part, et qui indiquait par exemple : « Nauru's case is that the rehabilitation of lands mined-out before 1 July 1967 is the responsibility of the former Administering Authority » (CR 91/18, p. 51) ;
— à celle du professeur Connell qui définit les BPC comme l'« alter ego » — c'est son expression — des trois gouvernements (CR 91/19, p. 43) et qui, citant l'annexe 5 du volume 3 du mémoire de Nauru, a insisté sur le fait que « the Nauruan delegation has argued from the beginning that the responsibility for restoring the land already mined . . . rests with the Partner Governments » (CR 91/19, p. 35) ou
— à celle du professeur Crawford lui-même, que le thème dont il avait la charge devait cependant rendre attentif à éviter ce genre de « lapsus » — qui sont autant d'aveux — et qui a pourtant visé, par exemple, « the Australian involvement as partner in . . . the BPC's operations in Nauru » (CR 91/20, p. 84), etc.

Je pourrais multiplier les exemples et les citations, mais je ne veux pas abuser de la patience de la Cour. Je vous prie seulement, Monsieur le Président, de me permettre d'ajouter ceci : au cours des deux premiers jours de plaidoiries (mon ardeur à établir des statistiques s'est lassée au troisième jour...), les coagents et conseils de Nauru ont évoqué, directement ou par citations interposées :

— 12 fois les « trois gouvernements » ;
— 51 fois les « gouvernements participants » (« Partner Governments ») ;
— 28 fois l'autorité administrante ; et
— 36 fois les BPC,

soit un total de 127 fois pour l'ensemble de ces quatre expressions. Ils ont beaucoup moins parlé de l'Australie seule ! Peut-on imaginer un aveu plus éclatant du véritable objet de la requête ?

On ne peut éviter, enfin, d'évoquer — et c'est le quatrième point que j'avais énoncé — le dernier.

4. L'INCIDENCE QUE PEUT AVOIR EN L'ESPÈCE LE DROIT DE LA RESPONSABILITÉ INTERNATIONALE

15. Car c'est bien d'un problème de responsabilité qu'il s'agit. Toutefois, je peux être bref et je le serai, car je n'ai pas le sentiment que M. Crawford ait témoigné, au nom de Nauru, d'une grande conviction sur ce point.

Le problème, Monsieur le Président, est le suivant : peut-on trouver, dans le droit de la responsabilité internationale des Etats, des éléments permettant de dissocier, aux fins d'un prononcé judiciaire, les responsabilités d'Etats qui, par leur action conjointe et la violation identique d'une obligation commune, auraient concouru à l'existence d'un dommage unique ? La réponse, très fermement, est négative, que l'on se place sur le terrain de la jurisprudence internationale, sur celui de la doctrine, ou sur celui des principes généraux tirés des droits nationaux.

16. En ce qui concerne la « recherche de jurisprudence », il faut bien dire que le « match est nul » entre les deux Parties. Du côté australien, nous avons toujours admis qu'il n'existait pas de précédents entièrement convaincants permettant d'établir que, dans une hypothèse comme la nôtre, la responsabilité doit être considérée comme conjointe (si ce n'est quelques décisions internes isolées qui sont très nettes en ce sens). Et si l'Australie a mentionné l'affaire de la faillite du Conseil international de l'étain (cf. exceptions préliminaires, p. 129, et CR 91/17, p. 34), c'est moins en tant que précédent — car il est vrai que les circonstances étaient assez différentes (cf. CR 91/20, p. 62-63) — que parce que la Chambre des Lords, par la plume de Lord Templeman, a dans cet arrêt important bien montré qu'il serait injuste qu'un coresponsable soit condamné à réparation pour l'ensemble d'un dommage s'il ne peut, ensuite, se retourner contre les autres auteurs de celui-ci, ce qui serait le cas en l'espèce.

Mais il faut bien voir que la jurisprudence invoquée en sens contraire par Nauru est moins éclairante. Nauru se borne à citer quatre arrêts rendus par la Cour dont, avec la meilleure volonté du monde, je n'aperçois pas la pertinence. Par les deux premiers, ceux relatifs aux affaires du *Personnel diplomatique et consulaire des Etats-Unis à Téhéran*, et des *Actions armées frontalières et transfrontalières (Nicaragua c. Honduras)* (cf. CR 91/20, p. 94), la Cour a rappelé qu'elle pouvait connaître de certains aspects — juridiques — d'un différend sans en connaître d'autres — politiques (cf. *C.I.J. Recueil 1980*, p. 19, et *C.I.J. Recueil 1988*, p. 92). Quant aux deux autres, rendus l'un et l'autre dans l'affaire du *Détroit de Corfou* (CR 91/20, p. 96), ils ont un rapport extraordinairement lointain avec notre affaire puisque les bases de la responsabilité de l'Albanie, d'une part, et de celle, fort éventuelle, de la Yougoslavie, qui n'avait nullement été constatée par la Cour, qui n'avait même pas été invoquée devant elle, de l'autre, eussent, de toute manière, été entièrement différentes. Si l'on préfère présenter ceci dans un langage plus familier aux juristes de *common law*, terrain sur lequel je m'aventure rarement, les « causes of action » étaient tout à fait distinctes.

17. La doctrine n'est guère plus prolifique.

En particulier, contrairement à ce qu'a affirmé mardi le conseil de Nauru, la Commission du droit international n'a jamais expressément pris position sur le problème en examen — tout en se montrant fort réticente, je l'ai déjà dit, vis-à-vis de l'idée même de solidarité (voir CR 91/20, p. 86-87).

En revanche le commentaire qu'il a cité de l'article 27 de la première partie du projet de la CDI sur la responsabilité des Etats non seulement ne sert pas la thèse qu'il soutient, mais il la contredit. Il est, en effet, bien précisé dans le passage qu'il a retenu (*ACDI*, 1978, vol. II, deuxième partie, p. 112) que « le comportement de l'organe commun [peut-être, ici, l'autorité administrante — mais est-ce un « organe » ?] ne peut qu'être considéré comme un fait de chacun des Etats dont il est l'organe commun », ce qui montre clairement que, si l'Australie est tenue pour responsable d'un quelconque fait internationalement illicite, les deux autres gouvernements participants le seront aussi, par voie d'inéluctable conséquence (et non par simple « implication », comme M. Crawford veut me le faire dire). Mais, pour le reste, la position de la Commission ne fournit aucune piste sur la question de savoir à quel type de réparation, solidaire ou conjointe, sont tenus les Etats se trouvant dans cette situation.

18. J'en aurai presque terminé sur ce point, Monsieur le Président, lorsque j'aurai relevé que, si M. Crawford a eu la bonté de se montrer d'accord avec moi sur le fait que la transposition de règles des droits internes en la matière est aventureuse, cette non-transposabilité ne tient pas seulement, contrairement à ce qu'il a dit, au fait que ces systèmes juridiques sont le résultat de l'histoire, et des institutions juridiques et économiques propres à chaque Etat, ce qui, d'ailleurs, est certain (voir CR 91/20, p. 87-88). Elle tient aussi — elle tient surtout — à la structure propre de la société internationale.

Et c'est cette structure, ce génie propre au droit international, qui explique à la fois pourquoi un Etat ne peut voir ses «intérêts juridiques» déterminés contre son gré et pourquoi une condamnation à la réparation solidaire d'un dommage qu'il n'a pas commis seul mais conjointement avec d'autres n'est guère envisageable : dans les deux cas, c'est sa souveraineté qui serait menacée. Dans notre affaire, la souveraineté de l'Australie bien sûr — mais aussi, et peut-être plus encore, celle du Royaume-Uni et de la Nouvelle-Zélande.

19. La non-transposabilité des règles de droit interne a une autre incidence concrète dans notre affaire. Sur un point beaucoup plus spécifique.

Le conseil de Nauru se demande en effet pourquoi, alors que l'article 3 de l'accord de 1987 liquidant les avoirs d'outre-mer des BPC envisage la possibilité de poursuites contre un seul commissaire, il ne serait pas également possible de rechercher la responsabilité d'un seul des trois gouvernements devant cette Cour (CR 91/20, p. 95). La raison de cette impossibilité est, précisément, que les poursuites envisagées par l'accord de 1987 se situeraient au plan des droits internes et que les risques d'une condamnation *in solidum*, sans être certains, ne sont pas fictifs. Ceci non plus n'est pas transposable au plan international — et pour les raisons que j'ai dites.

20. On peut du reste prolonger l'interrogation et se demander aussi, comme le fait M. Crawford, pourquoi, alors que les trois gouvernements ont pu se partager, par l'accord de 1987, les avoirs des BPC, il ne pourrait pas en aller de même, devant la Cour, en ce qui concerne la détermination de la réparation qui serait due par l'Australie seule (CR 91/20, p. 84).

Il y a, à cela, au moins trois raisons.

En premier lieu, Nauru, elle-même, n'a pas demandé à la Cour de se borner à cela. L'Etat demandeur exige la réparation par l'Australie de l'ensemble du préjudice qu'il prétend avoir subi (transformant d'ailleurs ainsi quelque peu une responsabilité pour fait internationalement illicite en une sorte de responsabilité «objective»). J'ai subi un dommage, réparez !

En deuxième lieu, une limitation en ce sens des demandes de Nauru ne changerait, de toute manière, rien à l'affaire : la Cour devrait, en tout état de cause, apprécier le «dommage» global et en «déduire» la part incombant à la Nouvelle-Zélande et au Royaume-Uni — ce qui est une façon comme une autre de déterminer leurs responsabilités.

Encore ne pourrait-elle procéder ainsi qu'au stade de la réparation qui se situe, je l'ai dit mercredi dernier (CR 91/17, p. 32), «en aval» de la détermination de la responsabilité *stricto sensu*. Au contraire, les parties à l'accord de 1987 n'avaient nullement à déterminer de responsabilités ; il leur suffisait de procéder, comme elles l'entendaient, pour les raisons qu'il leur incombait d'apprécier, à la répartition des avoirs des BPC, sans aucune idée de réparation, et ceci fait toute la différence.

21. Tout ceci, Monsieur le Président, revient-il à dire que Nauru n'a aucun moyen d'agir ? Que si la Cour accueille les exceptions préliminaires australiennes,

en tout cas celle que je défends à cette barre, elle serait victime d'une sorte de déni de justice comme, très visiblement, son conseil affecte de le croire lorsqu'il pose — sans d'ailleurs y répondre explicitement — la question suivante: « Should an applicant State, which claims to have been wronged, be denied its day in court because the court only has jurisdiction over one or some of the wrongdoers, and other potential wrongdoers have not consented, or are not parties? » (CR 91/20, p. 64-65, voir aussi CR 91/20, p. 71).

Certes, il résultera de votre arrêt que Nauru n'obtiendra pas de prononcé judiciaire au fond. Mais, j'ai déjà eu l'occasion de le dire, ce n'est pas une situation extraordinaire en droit international (CR 91/17, p. 21), et Nauru, en admettant que justice ne lui ait pas été faite depuis bien longtemps déjà, contrairement à ce qu'ont montré mes éminents collègues, MM. Bowett et Jiménez de Aréchaga, ne se trouverait nullement privée de s'adresser aux trois gouvernements comme, du reste, elle continue de s'y employer, ainsi qu'en témoignent, par exemple, ses deux notes du 20 mai 1989 — au sujet desquelles ses conseils ont conservé, jusqu'à présent, un silence fort éloquent ... silence qu'une question venue du Siège arrivera peut-être enfin à rompre!

En tout cas, Monsieur le Président, l'Australie ne saurait admettre que, comme le laisse entendre M. Crawford, ce qu'il appelle le « trusteeship principle » ait pour corollaire le droit, pour un ancien territoire sous tutelle qui a accédé à l'indépendance, de saisir la Cour au mépris des principes fondamentaux régissant sa compétence (voir CR 91/20, p. 71). Qu'il résulte de la Charte que la tutelle a pour raison d'être la protection et le bien-être des peuples qui en ont « bénéficié », l'Australie, je l'ai dit tout à l'heure (*ibid.*, p. 77-78), en est mille fois d'accord.

Mais cet objectif ne saurait constituer une base valable de compétence juridictionnelle — surtout lorsque, comme c'est le cas dans la présente affaire, il en résulterait une inégalité, que les Nations Unies n'ont pas voulue, entre les Etats qui formaient l'autorité administrante et une atteinte grave à un principe, qui demeure fondamental dans la société internationale telle qu'elle est, le principe du consentement à la juridiction.

Ceci conclut ma plaidoirie que je vous remercie bien vivement, Monsieur le Président, Messieurs les Juges, d'avoir écoutée avec patience.

Et si vous le voulez bien, Monsieur le Président, M. Griffith, agent de l'Australie, souhaiterait formuler quelques très brèves observations sur la question des avoirs d'outre-mer des BPC, avant de présenter les conclusions finales de l'Australie.

REPLY OF MR. GRIFFITH

AGENT FOR THE GOVERNMENT OF AUSTRALIA

Mr. GRIFFITH: Mr. President, Members of the Court. The one remaining issue, as Professor Pellet just said, before we make Australia's final submissions, is the status of Nauru's claims to the overseas assets of the BPC.

Nauru says that this claim, either relates to the rehabilitation claim; or that it is a claim that is connected with and flows naturally from the various claims based on breach of trusteeship and other causes of action set out in the Nauruan Application (CR 91/20, p. 52).

Mr. President, at this point we seek to turn to Professor Brownlie's words of criticism often directed to us and we submit to the Court that this is a proposition unsupported by logic or common sense.

Clearly a claim to these assets cannot be said to flow from, or be related to, a separate claim based on the Trusteeship Agreement for rehabilitation of mined-out lands, or compensation for damage from the mining operation. The two claims have no common thread. Nauru relies heavily on the fact that some of the assets of BPC may have derived from past mining operations on Nauru. But that is quite irrelevant. It cannot show that the claim arises from, or flows from, or is consequential on alleged breaches of Trusteeship obligations arising from the failure to rehabilitate and this is what the principal Nauruan claim is based on. If the connection is so obvious, why was the claim to the assets not made in the Nauruan Application? No explanation has been given to the Court.

As I mentioned earlier, Nauru asserts that the claim to the assets only became actionable on the termination of BPC in 1987 and not before (CR 91/18, p. 57). This, we say, supports the Australian view that the claim really is a new claim, which is not connected with the alleged breaches of law set out in the Application.

Nauru has failed to articulate in any clear way the legal basis for its overseas assets claim, regardless of whether the claim be regarded as a new claim or not. Nauru merely says that it has a separate claim in relation to the overseas assets that was implicit in or consequential on breaches of the Trusteeship Agreement. But assertion alone does not establish this. Nauru provides no details that would establish its claim.

Nauru also contends that the diplomatic correspondence establishes a legal dispute because of the "firm tone" of the relevant exchanges and the fact that they disclosed an "unresolved issue" (CR 91/20, pp. 54-55). But, for the reasons we have already given to the Court, one needs more than this. One needs an opposition of views on a matter falling within one of the four categories within Article 36 (2) of the Court's Statute. In this regard, Australia is not insisting, as Nauru has suggested, on "formal claims in phraseology which anticipates the terms of an Application" (CR 91/20, p. 55). What we are looking for is evidence of an opposition of views in the sense required by the relevant case-law, to which our earlier submissions referred.

As to the requirement of a legal interest, Nauru still fails to identify those legally protected material interests which, it says, it possesses in relation to the overseas assets. It asserts that the BPC conducted its operations under the terms of the 1919 Agreement between the Partner Governments. That Agreement regulated *inter se* the way in which the Partner Governments met their Mandate and

Trusteeship obligations. Therefore, says Nauru, as we understand it, this establishes a sufficient legal interest in Nauru in relation to overseas assets. But, as I have indicated to the Court, Nauru has not in fact shown that its claim to the assets of the BPC derives from any breach, or alleged breach, of the Trusteeship obligation. It simply asserts a legal interest in the assets on the basis that they derived in part, although in some as yet unascertained part, from the operations on Nauru. This does not reveal a legal interest sufficient for Nauru to bring a claim, even if all the other matters in relation to the claim to which we have referred were put on one side.

Mr. President, I need do no more than reaffirm the other elements of Australia's submissions previously made in relation to this claim by Mr. Burmester, except that, in relation to the issue of procedural fairness, I say a few brief words further.

The question of procedural fairness cannot be answered by simply asking what is convenient or practical. The *Nicaragua* case involved the inclusion of an additional ground of jurisdiction in the Memorial. Here we have a case of an additional *claim*, having an entirely different subject-matter from that raised by the original claims.

The Court does not have a discretion in dealing with such an additional claim. In addition to the provisions of Article 38 of the Rules of the Court, to which we have referred, I draw attention to Article 40 of the Statute of the Court. In mandatory language it says that an application *shall* indicate the subject of the dispute. This Nauru failed to do.

The fact that interested third States *may* have received notice of the particular Nauruan claim through diplomatic correspondence is beside the point. The matter has to be determined on the basis of the rules applicable in all cases. Nor, in any event, is notification of a claim the same as notification that judicial proceedings have been instituted in relation to that claim. The right of third States to intervene, to take other appropriate action, is not adequately protected by the fact that Nauru happens to have raised the issue in earlier diplomatic exchanges with some other States.

Mr. President, that concludes in a timely manner Australia's arguments before the Court. I will now read, in accordance with Article 60, paragraph 2, of the Rules, Australia's final submission.

FINAL SUBMISSION OF AUSTRALIA

On the basis of the facts and law set out in its Preliminary Objections and its oral pleadings, and for all or any of the grounds and reasons set out therein, the Government of Australia requests the Court to adjudge and declare that the claims by Nauru against Australia set out in their Application and Memorial are inadmissible and that the Court lacks jurisdiction to hear the claims.

If the Court pleases.

The Court rose at 12.55 p.m.

EIGHTH PUBLIC SITTING (22 XI 91, 10 a.m.)

Present: [See sitting of 11 XI 91.]

REJOINDER OF MR. MANI

AGENT FOR THE GOVERNMENT OF NAURU

Mr. MANI: Mr. President and honourable Members of the Court.

First of all, I wish to submit that the written pleadings and oral presentations so far made by both the Parties before the Court points to the close interrelationship between the objections raised by Australia to the jurisdiction of the Court and the admissibility of Nauru's claims. They also highlight a clear disagreement between the Parties over the historical setting and implications of various material facts of the case, including facts which Australia would consider relevant to its preliminary objections.

Australia's treatment of the facts of the case, even facts crucial to the determination of the preliminary objections, has been eclectic and impressionistic, intended to create confusion in their proper understanding. This single factor necessitated an adequately elaborate treatment of the facts as part of Nauru's presentations, as reflected in its pleadings so far, both written and oral.

The oral presentations made by the Australian delegation have not raised any new substantial argument to counter the points of law and fact raised in the Nauruan pleadings.

The Australian Agent sets out two or three matters so that, as he states, "Court is not left with an incorrect impression of fault" (see CR 91/21, 21 November 1991, p. 8). I am not sure, Mr. President, that he has so succeeded. But he has most assuredly succeeded in further clouding issues carefully put before the Court on Tuesday by Nauru. Let me briefly refer to two of these, namely *(a)* resettlement and *(b)* the Davey Committee Report.

(a) Resettlement

In contradistinction to the Australian Agent (CR 91/21, 21 November 1991, p. 8), the rejection of resettlement cannot be altogether sheeted home to one side or the other — there was simply not a meeting of minds on the question of national identity.

Nauru has already stated that the Nauruan people were quite willing to consider proposals of resettlement, though showing a natural preference to stay on their own island, if only it could be rehabilitated (CR 91/19, 18 November 1991, p. 19).

It is wrong to assert that sovereignty, as such, was the sticking point of Curtis Island. It was a measure of autonomy that was being sought by the Nauruans and reference on this point is made to the quite full account by the Head Chief in his statement in the Nauruan Memorial (Nauru Memorial, Vol. 1, Appendix 1, paras. 18-23; see also United Nations Visiting Mission to the Trust Territories of the Pacific, 1956, *Report on Nauru,* Trusteeship Council, *Official Records, 24th Session*, Supplement No. 4, para. 51, see Nauru Memorial, Vol. 4, Ann. 9, p. 54; *ibid.*, para. 52, p. 54; United Nations Visiting Mission to the

Trust Territory of Nauru and New Guinea, 1962, *Report on Nauru*, Trusteeship Council, *Official Records, 29th Session*, Supplement No. 2, Nauru Memorial, Vol. 4, Ann. 11, p. 125).

In a sense, the Australian Agent's position regarding the breakdown of the resettlement negotiations reflected a consistent pattern on the part of Australia to attempt to reinterpret history in its favour, particularly on this point. I respectfully draw the attention of the Court to Annex I to the 1965 Report of the United Nations Visiting Mission which clearly presents the Nauruan version of what happened at these negotiations (see United Nations Visiting Mission to the Trust Territories of Nauru and New Guinea, 1965, *Report on Nauru*, Trusteeship Council, *Official Records, 32nd Session*, Supplement No. 2, p. 12, Nauru Memorial, Vol. 4, Ann. 12, p. 150). The question, therefore, was not one of Nauruan demand for Australia to concede its sovereignty over the Curtis Island, but one of the need to preserve the national and social identity of a people seeking self-government under the principle of self-determination. The issue of sovereignty was not the point, any more than it had been with the resettlement of the Banabans on the Rabi island.

(b) *Davey Committee Report*

The Australian Agent is right in stating that with the failure of the resettlement negotiations, the issue relating to the rehabilitation came to the fore. He then opened the door, a little more than Australia previously had done, to reveal some of the positive aspects of the Davey Committee Report as to rehabilitation, which were referred to in some detail by Nauru on 18 November (CR 91/19, 18 November 1992, pp. 27-28).

It is not that the Report was limited in its attitude to an agricultural use that was important, but rather that it opened up the real possibilities of land uses that were able to be achieved. These were, in fact, costed out by the Davey Committee. For example, the construction of an air-strip with water storage in conjunction was a major step never previously placed before the Nauruans. Whilst critical that the Davey Committee did not provide full rehabilitation of all areas, nevertheless Nauruans saw this as a welcome development, showing practicality of rehabilitation, not as the Australian Agent has suggested "little prospect for the feasibility of any rehabilitation project". As earlier stated, the later Weeramantry Report not only gives credibility to the Davey Committee's views, but advances them further (CR 91/19, 18 November 1991, p. 42). Australia is simply hiding its head in the sand to suggest that rehabilitation of the island is "impractical". The Davey Committee, and later the Weeramantry Report, have demolished that notion for ever.

In this context, Professor Bowett mentions that Professor Connell was right to describe rehabilitation in terms of a disagreement over practicalities and not as a legal dispute. Of course, the Court would understand that when describing the Davey Committee's findings, Nauru was concerned to bring to the mind of the Court the fact that this Committee had, in fact, opted for a strong measure of rehabilitation. On this it was showing "practicality". After all, what we were meeting there was the argument that Nauru's case had no credibility, based on a premise of rehabilitation responsibility that could not be fulfilled. This has been put to rest.

Mr. President, Professor Bowett also stated that the Davey Committee never talked of legal responsibility. That was clearly not one of its terms of reference and, in fact, the Australian statement immediately prior to its appointment had massaged that fact by saying that "this in no way committed them to meeting any costs for rehabilitating the island" (CR 91/19, 18 November 1991, p. 30). In other words, Australia was busy denying its legal responsibility. However, Professor Bowett has been good enough to draw attention to the passage that Professor Connell read out from the Davey Committee Report regarding extractive industries and the special circumstances operating for Nauru (CR 91/21, 21 November 1991, p. 33). Any fair reading of that would, I suggest, draw the immediate inference that the Davey Committee supported the Nauruan position even though its terms of reference precluded the Committee from so saying expressly.

REHABILITATION AND INDEPENDENCE TALKS

The Australian Agent has correctly identified the three issues on the agenda of the independence negotiations, namely (1) political independence, (2) control and future operations of the phosphate industry; and (3) rehabilitation of mined-out lands. In fact the Trusteeship Council itself had made this classification of issues. However, when it came to analysis, one finds that item (3), that is, rehabilitation, disappears into the folds of an astounding perversion of history which ends up in an unexpected fusion of the three issues into one issue, or perhaps two issues. The issue of rehabilitation has always stayed as a dominant and distinct issue, as explained in detail by my colleague Professor Barry Connell on 18 November (CR 91/19, 18 November 1991, pp. 28 ff.). I also refer here to Nauru Written Statement, Part I, Section 3 (pp. 8 ff.) and Nauru Memorial, Part I, Chapter 4 (pp. 69 ff.).

It is quite correct to say, as the Australian Agent stated, that during the Nauru Talks there were instances of give and take. But according to the history of the Talks, so well documented by the Australian officials at Canberra, pressure was clearly exerted on the Nauru delegation to abandon, whether formally (as part of the Phosphate Industry Agreement) or informally, their rehabilitation claim in exchange for ownership of the phosphate industry and independence. The Nauruan delegation most categorically rejected the Australian suggestion of abandonment of the rehabilitation claim. The Nauru pleadings, both written and oral, contain a number of references to the records of the Nauru Talks on this point as well. I would only recall the oral statement made by Mr. Hammer DeRoburt, the Head Chief of Nauru on 15 November (CR 91/18, pp. 14 and 15); my earlier oral presentation on the same day (*ibid.*, pp. 40-44) and the oral presentation of Professor Barry Connell on 18 November (CR 91/19, pp. 35-37).

Mr. President, the Australian Agent said: "What is important is that the Agreement was struck to dispose of the three issues identified by Chief DeRoburt." (CR 91/21, p. 15.) This is completely wrong, and is inconsistent with all documentary evidence. The decision on independence was based on an agreement concluded quite separately from the Phosphate Industry Agreement. In fact, the independence agreement was not announced until 24 October 1967 by the then Australian Minister of Territories (Preliminary Objections of Australia, Vol. II, Ann. 8, p. 61). On the other hand, on the third issue, agreement could not be reached between the parties on rehabilitation.

THE HEAD CHIEF'S STATEMENT OF 6 DECEMBER 1967

Professor Bowett has, in his second oral presentation, shifted his earlier stand by changing his interpretation of Mr. DeRoburt's statement before the Fourth

Committee of the United Nations General Assembly on 6 December 1967 (CR 91/21, 21 November 1991, p. 40). Now, the missing sentence is of no importance because Professor Bowett says so. By way of reply, may I refer to Head Chief Hammer DeRoburt's oral presentation of 15 November (CR 91/18, p. 18) and also to the oral presentation of Professor Barry Connell of 18 November (CR 91/19, p. 84). If, according to Professor Bowett, rehabilitation was purely an economic or financial problem, the implications of phosphate being a wasting asset do not indicate any economic or financial problems at all! Nauru rejects all such artificial interpretations on Mr. DeRoburt's statement, as they are aimed solely to produce a waiver of a claim central to the concern of a small community. We note in this context that even Professor Bowett's analysis would lead to an equivocal result upon which little reliance could be placed.

LACK OF GOOD FAITH: REHABILITATION FOR NAURU

Mr. President, the Agent for Australia further argues that "Nauru's own actions since independence confirm the limited prospects for rehabilitation". Then he says: "Nothing has been rehabilitated. Nauru points to the stockpiling of soil and little else." (CR 91/21, 21 November 1991, pp. 10-11.) Thus, his argument in effect asserts lack of good faith on the part of Nauru.

The above statement of the Australian Agent, more than anything else, reveals a considerable degree of innocence on matters relating to large scale restoration of mined-out lands in general, and particularly of mined-out lands which constitute four-fifths of a single island coral atoll such as Nauru. A perusal of the Report of the Nauru Commission of Inquiry headed by Professor C. G. Weeramantry (as he then was) would in fact be instructive in this regard. Incidentally, I take this opportunity to clarify an earlier statement made by Head Chief Hammer DeRoburt. Professor Barry Connell was the counsel assisting the Commission of Inquiry, and not a member.

Nauru has already explained, rather elaborately, the scope and extent of work done so far by Nauru towards fulfilment of its obligation to rehabilitate the phosphate lands worked-out since 1 July 1967. I respectfully draw the Court's attention to Section 4, Part I, of Nauru's Written Statement (p. 14), and also to my earlier oral presentation of 15 November (CR 91/18, pp. 51 ff.). Nauru firmly denies that it has failed to show good faith in this regard.

THE NATURE OF AUSTRALIA'S OBLIGATIONS UNDER THE TRUSTEESHIP

The Australian counsel, Professor Pellet, said that Australia, as the Administrator of the Territory of Nauru, acting alone could not have asserted itself against the British Phosphate Commissioners (BPC) who had the total control over everything relating to the phosphate industry. While Professor Crawford will deal with this point on behalf of Nauru more adequately and more comprehensively, Mr. President, please permit me to point out that the responsibilities of Australia as the Administering Power emanated from the Mandate and the Trusteeship Agreement and that it was obliged to give effect to the principle of disinterestedness and the right of the colonial people to sovereignty over their natural resources.

Can an Administering Power take shelter under certain private agreements to evade international obligations imposed by the Mandate and the Trusteeship Agreements, and Article 22 of the League of Nations Covenant and Chapters XI, XII and XIII of the United Nations Charter, and also under general international law? The answer is obviously in the negative. It may be of interest to note in this context that until the independence of Nauru there was only *one* flag, literally *one* flag, that flew on Nauru and that was Australia's.

PHOTOGRAPHS

Nauru is indebted to the Australian Agent for drawing attention to the "devastating view" in photograph 2 of Volume 2 of the Nauru Memorial (CR 91/21, 21 November 1991, p. 10). Of course, Nauru knows and the Court is aware that Nauru is constitutionally responsible for two-thirds of the rehabilitation. Volume 2 carefully makes the distinction for the Court. I draw attention to the fact that map 3 in Volume 2 gives the location and direction of photographs and on that map are clearly marked the areas mined-out under Australian Administration. Some recent mining is shown simply to demonstrate the method of mining and how one arrives at the situation shown in the so-called "devastating view".

Two distinguished Members of the Court were good enough to direct questions to us on Tuesday, 19 November. The Nauru Counsel will answer the question posed by Judge Shahabuddeen. However, as regards the question raised by Judge Schwebel, Nauru would wish to take advantage of the facility to submit its reply in writing[1].

Before I conclude, I must acknowledge with thanks the assistance so kindly rendered by my distinguished colleague, Professor Connell, in the preparation of this presentation.

And, Mr. President, I would now request you to call upon Professor Ian Brownlie to continue Nauru's oral presentation.

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[1] See p. 503, *infra. [Note by the Registry.]*

REJOINDER OF MR. BROWNLIE

COUNSEL FOR THE GOVERNMENT OF NAURU

Professor **BROWNLIE**: Mr. President, Members of the Court, may it please the Court.

My task is to address the objection relating to other methods of settlement and also the argument based on waiver.

Australia has been content essentially to maintain its submissions on the issue of delay, and Nauru does likewise and I shall not refer to that topic again (see CR 91/20, pp. 12-19).

PRELIMINARY MATTERS

There are also two preliminary matters to which I would, with respect, draw the Court's attention.

The Role of Facts in these Proceedings

In the first place I would like to explain why Nauru thought it necessary to place emphasis on the facts even at this stage of the proceedings.

In our view the nature of the issues, and not just the fluidity of the Australian arguments, has necessitated a substantial excursion into matters of fact. The case concerning the alleged waiver, for example, has called for a careful examination of the documents available.

But there is another aspect of the facts which has been the subject of particular concern to Nauru.

I refer to the issue of good faith.

It is true that yesterday the distinguished Agent of Australia stressed that Australia's submissions on the issue are limited, and Nauru is pleased to take note of this statement.

However, in the Preliminary Objections the principle of good faith is invoked in relation to a series of assertions which amount to the charge that Nauru is simply not serious about rehabilitation.

If I could remind the Court of the most uncharitable passage in the Preliminary Objections:

> "It is contrary to the principle of good faith for Nauru, having taken no steps itself to rehabilitate areas mined under its own control, and despite having been provided with adequate financial resources, to now make a claim on Australia for alleged breaches of the Trusteeship Agreement. Rather, such a claim is exposed as no more than a convenient demand to focus attention elsewhere than the place where the responsibility for Nauru's present condition in fact lies — Nauru itself. The claim, given the circumstances in which it is made, is not only made without good faith, but is also disclosed as not based on legitimate grounds in law." (Preliminary Objections of Australia, p. 163, para. 406.)

This flavour was maintained in the first round of the oral hearings, and my colleague, Professor Connell, acting under precise instructions, found it necessary to place the history of the question of rehabilitation on record.

In this same context, it is not really convincing when Mr. Griffith says that the issue of good faith has not been submitted as a separate preliminary objection. It was after all given prominence in the Preliminary Objections (pp. 162-164) as an aspect of judicial propriety and that was the terminology used.

Whether the issue is classified as a preliminary objection, or as going to the "inherent jurisdiction" of the Court, as a matter of propriety, is, in our submission, really a matter of academic interest.

The issue of good faith, applied in a rather broadcast way, has inevitably necessitated the correction of the record by Nauru.

The Jurisdictional Ambience of these Proceedings

As a second preliminary point, I would like to refer to the particular ambience of these proceedings from a jurisdictional point of view.

In the first place, there are two coincident declarations accepting the jurisdiction of the Court.

Australia has only raised one preliminary objection relating to jurisdiction. In general both declarations are coincident in ambit.

And so, in our submission, Mr. President, it should follow that the principle of consent is paramount and that there is a presumption of the existence of jurisdiction.

Now we appreciate that in practice the Court does not find that recourse to presumption is helpful, but in the present case, in our view, there are cogent reasons for imposing a high standard of proof in relation to the alleged "tacit agreement" invoked by Australia as a justification for limiting the competence of the Court in these proceedings.

And apart from that, we would say that in general the other Australian preliminary objections constitute thinly disguised issues of merits.

AGREEMENT TO HAVE RECOURSE TO SOME OTHER METHOD OF PEACEFUL SETTLEMENT

I turn now to the argument based on an alleged agreement to have recourse to some other method of peaceful settlement.

Professor Jiménez de Aréchaga raises the question of form. In my speech in the first round I had made the point that, since no written text had been proposed as the basis of the agreement, then the alleged agreement could only have been tacit. I had certainly not suggested that form was a mandatory requirement.

The key point is surely that in practice it would be highly unlikely than an agreement on a mechanism for the settlement of a dispute or family of questions of a legal nature would be tacit. No examples of such agreements have been indicated and, in our submission, it may be doubted whether any examples exist.

In this connection it is to be recalled that a particular concern of States resorting to this type of reservation was the problem of overlap with existing or future compromissory clauses in treaties and conventions.

And the reasonable inference is that the Australian condition has a similar connotation and certainly does not refer to the action of political organs of the United Nations.

As to the evidence of the course of conduct offered by Professor Jiménez de Aréchaga in his reply, this appears to be essentially identical to the material offered in the first round.

Moreover, Counsel for Australia continue to ignore the temporal element in the evidence.

For it was only within a few weeks of independence, and we pointed this out before, that it became clear to the Nauruans that Australia would not recognize the responsibility concerning rehabilitation, and thus there was in fact no mature dispute to be submitted to one of the "traditional methods of peaceful settlement of disputes" (Professor Jiménez de Aréchaga, CR 91/15, pp. 44-45).

Mr. President, there is a certain unreality in the idea that the negotiations of the period 1965 to 1967 were anything more than that. The Nauruan position was that if the responsibility for rehabilitation was not accepted by Australia, then Nauruan rights would at least be reserved. And until the signing of the Canberra Agreement on 14 November 1967, there could be no dispute as such to be submitted to a procedure of settlement.

The Australian argument supposes that an unaccepted proposal within a series of continuing negotiations should have been referred to dispute settlement. And the hypothesis, in our submission, is evidently artificial.

I shall now turn to the question posed by Judge Shahabuddeen.

He asked whether the agreements contemplated by the Australian reservation included agreements made between Australia and entities which were not States at the time the agreements were made.

My reply on behalf of Nauru has two elements.

In the first place, there can be no doubt that the natural inference must be that the Australian reservation refers only to agreements with States. This is because the terms of the declaration must be presumed to be in accordance with the provisions of the Statute of the Court and, according to the Statute, Article 34, paragraph 1, "only States may be parties in cases before the Court".

So the reservation can only have a purpose in relation to overlapping clauses.

However, Nauru finds it necessary to add a second element to the answer.

In our submission, in any case, the question could not arise on the present facts because the agreement postulated by Australia by its very nature would cease to have any effect at the time of independence.

That is our reply to Judge Shahabuddeen.

And in the light of this reply, Nauru recalls that its position is entirely compatible with the argument that the constitutive facts of the legal dispute prior to independence have been recognized by the Respondent State as a legal dispute persisting at the time of independence (see Written Statement, para. 113).

THE ALLEGED TACIT AGREEMENT AND THE LAW OF TREATIES

Mr. President, I would now like to return to the hypothesis of a tacit agreement involving the Nauruan Community and Australia for the settlement of various questions involving breaches of the Trusteeship Agreement by the organs of the United Nations.

In my submission, such an agreement would be subject to the principles of the Law of Treaties which continue, of course, to form part of customary international law.

It is not simply that the Vienna Convention only applies to agreements in written form. The alleged agreement now in issue antedated the coming into force of the Vienna Convention in any case.

However, the provisions of the Vienna Convention on questions such as invalidity and termination naturally reflect the codification work of the ILC, which completed its work on treaties in 1966 and reported to the General Assembly. If

I may remind the Court, Article 48, paragraph 1, of the Vienna Convention deals with the effect of error, and it provides as follows :

> "A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty."

Article 49 provides that

> "if a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, the State may invoke the fraud as invalidating its consent to be bound by the treaty".

Mr. President, why this excursion into the Law of Treaties?

Australian Counsel has accused Nauru of accepting only certain parts of the legal régime. But in postulating a tacit agreement in the period 1965 to 1967 Australia, in our submission, must face the implications of that hypothesis. And the implications are surely to be found in the Law of Treaties.

In its Memorial, as part of the particulars of breaches of obligation under the Trusteeship Agreement, Nauru has presented evidence that Australia failed to report fully and fairly on the financial aspects of the production and disposal of the phosphate deposits. Specific evidence is provided of the dubious practices of the BPC in reporting to the Trusteeship Council over a very long period (Memorial, pp. 121-140). Evidence is provided of the systematic suppression of important information concerning the financial position of the BPC.

For present purposes it is only necessary to point out that there is documentary evidence of substantial misrepresentations, both to the Nauruans and to the United Nations organs, on the basis of which it is reasonable to assume that the tacit agreement, if it had existed, would have been void or voidable as a result of the error induced by the lack of fair and accurate reporting on the financial basis of the phosphate operations.

No doubt it can be said that these issues go to the merits.

Exactly so, Mr. President.

But they are directly relevant to certain aspects of the Australian argument.

The legal status of the alleged tacit agreement must have been extremely problematical. For, apart from the effect of the systematic misrepresentations in the Law of Treaties, the agreement would also have fallen foul of Article 103 of the Charter and, in so far as it was imposed by the Australian Government, would have constituted a part of the problem not a part of the solution, as Australia contends in these proceedings.

There is also the further consideration that, when the issues are seen in the context of the breaches of the Trusteeship Agreement referred to in our Memorial, even the Australian preliminary objection based on the reservation of other methods of settlement is discovered not to have an exclusively preliminary character.

THE ALLEGED WAIVER AND THE AUSTRALIAN MISREPRESENTATIONS

My next task is to respond to the speech of Professor Bowett but, before I move on, I need to deal with one aspect of the waiver argument at this stage.

A waiver may be the result of an agreement, involving a *quid pro quo*, or it may constitute a unilateral act — that is obvious enough. If it is a unilateral act, its legal validity may still depend on certain conditions, given that waiver is a voluntary act.

On this basis, Nauru contends that the misrepresentations which I have just noted in the context of the alleged tacit agreement, also have the legal consequences that the alleged waiver, if it occurred, would have lacked essential validity.

THE ALLEGED ABSENCE OF ANY ALLEGATION OF BREACH OF THE TRUSTEESHIP AGREEMENT

In his reply, Professor Bowett reiterated his argument that Nauru failed to assert that failure to rehabilitate was a breach of the Trusteeship Agreement.

On this issue generally Nauru reaffirms its position as stated in the first round (CR 91/19, pp. 62-71).

Professor Bowett, attempting to improve on the positions adopted in the first round, presents a number of what are essentially debating points.

In the speech characteristic of the Australian method of pleading in these proceedings, Counsel for Australia stays well clear of the documents.

Mr. President, the proposition Professor Bowett was defending was that Nauru had failed to make a claim for breach of the Trusteeship Agreement. Yet in seven pages of text received by me, there is reference to only two documents.

The documents referred to in the transcript of the first round are for the most part ignored.

The Nauruan argument (CR 91/19, pp. 68-69) that for a claim to emerge from the evidence it is necessary to foreshadow the precise contents of the Application, remains unanswered.

The Nauruan argument (CR 91/19, p. 69) that there could be no question of presenting claims — as opposed to reserving rights — until the question of rehabilitation was finally left unresolved, remains unanswered.

There is, however, concession to the effect that the Nauruan delegation to the Canberra Talks made "occasional references" to Trusteeship obligations.

The references to Trusteeship obligations were, in fact, in our view, reasonably persistent. Moreover, major Nauruan delegation papers presented the legal position on rehabilitation as clearly as could be expected in the context of what was not an arbitration, adjudication or conciliation, but a negotiation.

Moreover, Counsel for Australia stays away from a particularly telling passage.

If I may remind the Court, the Record of Discussion for the evening meeting of 16 May 1967 of the Canberra Talks contains the following passage:

> "During the following discussion it emerged that the Nauruans would still maintain their claim on the Partner Governments in respect of rehabilitation of areas mined in the past, even if the Partner Governments did not press for the withdrawal of the claim in a formal manner such as in an agreement." (Nauru Memorial, Vol. 3, Ann. 5, p. 411 at p. 466.)

This passage refers to maintaining the claim and to withdrawal of the claim, which is refused. It makes clear that not only would the Nauruans refuse to agree to a formal withdrawal but they would not accept an implicit withdrawal.

The Australian approach to the documents has been, in essence, to complain that the Nauruan representatives did not constantly use the language of Foreign Ministry legal advisers.

Nauru's case is that, given the actual circumstances, the absence of a Foreign Ministry and a negotiation between a dependent territory seeking independence from its metropolis, then the evidence of a dispute, which was a legal dispute and involved Trusteeship obligations, was more than sufficient.

A perfect example of a sufficiently-explicit reference to the international law background appears in the formal statement made by the Nauruan delegation during the 1966 Talks. If I could read the passage just once more, because it has been consistently ignored by the other side. This is the Session of 20 June 1966:

> "The Nauruan people have consistently claimed [this is in 1966] that it is the fundamental responsibility of the Administering Authority to restore the mined phosphate lands to their original condition. *This responsibility stems in part from the obligation that the Administering Authority has under the United Nations Trusteeship System to safeguard the future of the Nauruan people.* It also stems from the very large profits from past mining activity that the Administering Authority has chosen to distribute to phosphate consumers in Australia, New Zealand and the United Kingdom (by not charging world prices) instead of returning them to the Nauruan people as their due entitlement." (Nauru Memorial, Vol. 3, Ann. 4, p. 333 at p. 340; Session of 20 June 1966, Section B, para. 1; emphasis added.)

Whilst for the most part standing away from the documents, Counsel for Australia is content to say that this passage refers only to a responsibility which stems "in part" from the Trusteeship System. But in the context of the passage, this phrasing in no way reduces the significance of the legal proposition which is made.

THE EVIDENCE OF WAIVER

In general, Nauru reaffirms the arguments and submissions on this question in the first round (CR 91/19, pp. 56-86; CR 91/20, pp. 8-12).

In the first place Australia maintained its general approach to the evidence. Thus certain episodes are focused upon but the overall pattern of conduct by Nauru is ignored.

Specific evidence adverse to Australia is the subject of silence and thus no attempt has been made to explain the silence of the Australian representative at the Thirteenth Special Session of the Trusteeship Council on 22 November 1967 in face of a precise statement of the Nauruan claim (see CR 91/19, p. 85).

In the second round Professor Jiménez de Aréchaga argued that it was significant that the alleged waiver by Mr. Hammer DeRoburt occurred in the Fourth Committee on 6 December 1967 in contrast to the statement on 22 November 1967 which occurred in the Trusteeship Council.

Nauru considers that what is legally significant is the documentary record taken as a whole, including the records of the discussions from 1965 to 1967.

But two further observations are called for. The distinction between the Fourth Committee and the Trusteeship Council can have no importance unless the statement of 6 December 1967 involved a renunciation of rights and, in our submission, there is no evidence that it did.

Secondly, there is a certain contradiction in the picture presented by Professor Jiménez de Aréchaga. You may remember, the context, according to Counsel for Australia, is a process of dispute settlement, appropriate for legal disputes and is the culmination of a process involving what he called "traditional methods" of peaceful settlement.

Mr. President, it is very odd, if that were the milieu, to discover that the critical outcome of dispute settlement must depend on whether a statement is delivered in the Fourth Committee or in the Trusteeship Council. That is to say, in one political organ rather than another.

Finally, Counsel for Australia suggests that since 22 November the Head Chief, Mr. Hammer DeRoburt, had had a radical change of mind. No evidence is offered for this piece of supposition.

I shall turn now to Professor Bowett's examination of waiver, as presented in the second round.

Once again, as in the first round, Counsel for Australia constructed with great panache what was, in result, an entire Potemkin village of suppositions. And the process of construction was a pleasure to witness.

The Court was told of a "package deal" of 1967. But the Phosphate Industry Agreement was not a "package deal" and was not expressed to be one.

The Court also heard again of the alleged significance of the five months — the critical five months — between the May/June Talks of 1967 and the signature of the Canberra Agreement on 14 November 1967.

As I indicated earlier in this speech, in May 1967 the Nauruans had refused a request from the Partner Governments for a formal renunciation and Professor Bowett acknowledges that refusal.

But he goes on to say: "This is why the five months *after* May are so important, for between May and the signing of the Canberra Agreement on 14 November 1967, five months later, no more is heard of the Nauruan claim." He interprets this silence as a waiver and suggests that this five months induced the Partner Governments to believe Nauru had quickly dropped its claim and adopted their package offer. And certainly he goes on to say that by keeping its silence, Nauru made no attempt, in his view, to correct this view of the Partner Governments.

Mr. President, in our submission, this is pure supposition. However, it does have the advantage of reducing what had previously been 24 years of alleged silence to a mere five months. Otherwise, in our view, it lacks merit.

First, the Heads of Agreement for the sale of the phosphate industry was signed on 15 June 1967.

Secondly, both sides had agreed to put to one side the issue of rehabilitation whilst the issues of the sale of the phosphate industry and that of independence were determined.

Thirdly, the Agreement for independence and the date 31 January 1968 were not agreed by Australia until 15 October 1967. The separate Agreement on independence was announced in a statement to the Australian House of Representatives by the Australian Minister for Territories only on 24 October 1967 (Preliminary Objections of Australia, Vol. II, Ann. 8, p. 61).

The independence arrangements involved considerable negotiations and detail, as can be seen from the Australian Minister's statement. It is therefore mistaken, in plain fact, to say, as the Australian Agent said yesterday: "What is important is that the Agreement was struck to dispose of the three issues identified by Chief DeRoburt." And I respectfully remind the Court that these three issues were (1) political independence, (2) control and future operation of the phosphate industry and (3) rehabilitation of mined-out lands. These were separate issues requiring separate agreements.

Fourthly, the Phosphate Industry Agreement was being drafted on the basis of the signed Heads of Agreement with some care by the Attorney-General's Department in Canberra and it was not signed until 14 November 1967.

Fifthly, there was no airline to Nauru in those days and Nauruan delegates came and went by sea. The time of Nauruan leaders was well taken up getting home, informing the electorate, negotiating the independence agreement in detail, and arranging to attend the Trusteeship Council on time. There simply was no time to negotiate what the Head Chief described as "the most irreconcilable of the three issues".

Sixthly, the Head Chief made it clear to the Trusteeship Council on 22 November that the matter of rehabilitation was still outstanding, and proclaimed that fact again to all the assembled persons as recounted in these oral hearings by Professor Connell on Independence Day.

So there was no waiver, either express or by implication. Furthermore, there was absolutely no contemporary document that would show that either Australia, the other Partner Governments or the United Nations believed or were induced to believe that Nauru had dropped its claim. The evidence of silence from the Australian Representative in the Trusteeship Council certainly points the other way.

Professor Bowett returned to the theme that on 6 December 1967 Mr. Hammer DeRoburt waived the claim. In his second round speech he now concedes the possibility that there were two problems to which the Head Chief was referring and that one of them was "clearly the rehabilitation".

My submission on this subject is quite simple. Hearing the debate between the two sides in these proceedings the supposition which is the most favourable to Australia is that the statement on 6 December is equivocal. And that is the best that Professor Bowett can now do in the second round.

But equivocal though it may be, Mr. President, it contains no words of renunciation.

Given the evidence as a whole, and given the nature of the statement itself, there is, in our submission, no basis for a finding that the statement was, in law, a renunciation of rights.

I shall leave it to my colleague, Professor Crawford, to deal with the legal implications of the termination of the Trusteeship.

Mr. President, that completes my second round argument on the alleged waiver.

Before concluding, however, there are certain other points with which I must deal briefly.

First, there is the question of the overseas assets of the BPC. In general Nauru reaffirms the submissions on this subject presented in the Written Statement (pp. 115-136) and in the first round of these oral hearings (CR 91/20, pp. 51-58).

In the second round the speech of the Australian Agent failed, in our submission, to present anything really new on this question. However, his speech evokes three short comments.

First, BPC, in his view, is a sort of autonomous entity, and almost a foreign corporation. Australia cannot see the implications, in terms of the law of State responsibility, of the phosphate operations. Under the Trusteeship régime Australia was responsible for controlling the operations of the BPC. And it remains responsible for the consequences of those operations. The fact that an entity on territory happens to be a private entity, if that's what it was, is certainly not an exclusion of State responsibility if the obligations require control of operations on that territory.

Secondly, there is no reason to assume that the BPC had ownership of the phosphate lands or, if in some sense it did, that this protects Australia from responsibility for breach of its international obligations under the Trusteeship régime.

Thirdly, for purposes of this phase of the proceedings it is only necessary for Nauru to establish a credible claim to some part of the general fund which was disposed of in 1987. The Agent of Australia has in this respect failed to appreciate the distinction between what is called for at this stage by way of establishing a legally protected interest and what is called for at the stage of the merits.

Finally, I would like to draw the attention of the Court once again to what I call the sufficient funds hypothesis. If I could remind the Court that in the first round, in his speech, the Agent of Australia said this:

> "after October 1964 it is clear that the only reasonable course left to the Partner Governments was to provide the Nauruan people with sufficient financial resources for a viable independent future, including the financial means to carry out rehabilitation if that was their choice".

And that is the theme which appears in documents in the Canberra Talks of 1965 to 1967. This is a strange theme to emphasize.

Australia is asking the Court not to exercise its competence, not to address the legal issue raised by the Application. And alongside that, it is saying, and in any case why should you give justice to this particular Applicant State. And this emphasis on sufficient funds involves no reference to legal obligations. It assumes that Australia had a prerogative to decide what was good for the Nauruans as opposed to what was Australia's responsibility under the Trusteeship. And it involves after all an eccentric approach to justice. According to the sufficient funds approach, if I knock somebody down with my motor car, my duty is confined to discovering whether they have a wallet which has a lot of money in it, or perhaps also what their credit worthiness is. This is a curious approach to the notion of justice.

And that concludes my presentation. I would like to thank my colleague Professor Connell for his co-operation in preparing some aspects of this speech and I would like to thank Mr. Griffith of the Australian delegation for co-operation in providing text of speeches promptly in the second round. And finally I thank the Court for its patience and kindness. Thank you, Mr. President.

REJOINDER OF MR. CRAWFORD

COUNSEL FOR THE GOVERNMENT OF NAURU

Professor CRAWFORD:

INTRODUCTION

Mr. President, honourable Members of the Court. It is my task to address the various points made by Professor Jiménez de Aréchaga, Professor Bowett and Professor Pellet in their reply on behalf of Australia, so far as they related to the issues of termination of the Trusteeship or non-joinder of third parties.

TERMINATION OF THE TRUSTEESHIP

2. I will deal, before the break, with termination of Trusteeship. It may help the Court if I deal with the issues of termination in the same order as that adopted in my treatment of the issues last Tuesday.

RELATIONSHIP BETWEEN THE TRUSTEESHIP AGREEMENT AND GENERAL INTERNATIONAL LAW

3. On this issue Professor Bowett claimed to agree with the Nauruan analysis (CR 91/21, 21 November 1991, p. 45). To judge from what he did with that analysis rather than what he said, the agreement was only grudging. For apparently its only effect was to enable him to allege yet another basis for the termination of rights. He accepted that the General Assembly must have taken such principles as self-determination and permanent sovereignty over natural resources into account when dealing with issues of termination. But he then blithely asserted that this was no obstacle to the conclusion, on exiguous evidence, that rights as cogent, as salient, as these, were impliedly terminated at a time when the right-holder was still in a status of dependency in a situation of disadvantage. As Nauru has already argued, one function of these adjacent legal principles — if I may call them that — is that they powerfully reinforce the burden of proof on a wrongdoer who relies on extinguishment or waiver. Yet the Australian argument on these matters is not convincing even on ordinary standards of the onus of proof.

Limited Scope of the General Assembly's Power to Determine Legal Issues arising under a Trusteeship Agreement/Alleged Exclusive Authority of the United Nations Political Organs

4. During its first round Australia postulated — I was going to say invented — a broad and exclusive authority on the part of the political organs of the United Nations to determine legal questions, and to do so with conclusive effect (CR 91/20, 19 November 1991, pp. 32-36). There was no direct return to that position in the Australian reply.

5. But Professor Bowett's main argument was a derivative of his argument that the General Assembly has exclusive power over trusteeship obligations. He argued that the General Assembly could not have abdicated its responsibility by leaving the rehabilitation issue to be settled bilaterally because, in his words:

> "such an abdication of responsibility is simply incompatible with the whole elaborate system of supervision. And it would be a true abdication of responsibility, for there could be no other independent third party which could guarantee performance of the Trust." (CR 91/21, 21 November 1991, pp. 42-43.)

6. But, let us, for the sake of argument, assume that the General Assembly was "irresponsible" by reason of its relative silence in 1967. I note in passing that it was not absolutely silent, since it referred to its two previous resolutions dealing with rehabilitation. Would the consequence of this "irresponsibility" be that the Nauruans lost their rights? Because the General Assembly was not virtuous, were the Nauruans to be deprived of a subsisting right to rehabilitation? That is like saying that, because the relevant supervisor is irresponsible, and because the trustee is intransigent, then the beneficiary must be made to suffer. That would be a most improbable rule for a system of trusteeship.

In any event, the assumption that what the General Assembly did was a gross abdication is also wrong, or at least unfair. After all, the alternative was to delay the termination of the Trusteeship, which the Nauruan people had said they did not want, which would have gone against paragraph 5 of resolution 1514, the General Assembly's Charter in this matter, and which might not have achieved the desired result anyway. If the Nauruan people were prepared to take their chance in seeking a subsequent resolution of their claim through the normal methods of the international settlement of disputes, including the possibility, not to be excluded, of recourse to this Court, why should the General Assembly have refused?

Yet again we have this curious situation where every difficulty with the system has a termination of rights hidden somewhere in it. After independence it could not be guaranteed that the Nauruans would be able to enforce their claim — and so their claim is terminated. As if claims in international law always lapsed unless the claimant had a guarantee of success! The Nauruans seem to have been beneficiaries only of an elaborate system of traps, from which they could never escape with their accrued rights intact. (I say accrued rights, because that is the necessary assumption of both the termination and the joinder arguments. Whether the rights had accrued is of course a matter for the merits. For present purposes that has to be assumed.)

The Effects of Termination of the Trusteeship

7. Professor Jiménez de Aréchaga cited the Roman jurist Paulus, to the effect that the power to condemn implies the power to absolve. The first point to be made is that the power to condemn — as distinct from recommend, in the General Assembly — was not unlimited, and that the power did not, as I argued the other day, in the circumstances, extend to resolving the present claim against the Nauruans. But ignoring these qualifications, Professor Jiménez de Aréchaga went on to argue that the absence of condemnation implied absolution (CR 91/21, 21 November 1991, p. 25).

Mr. President, Paulus was concerned with the question of the existence of a power, not the question of the occasion for its exercise. Paulus was not saying that whenever an occasion arises in which condemnation is possible, but is not (for whatever reason) forthcoming, then the guilty person is absolved. That rule would play havoc with life in a monastery — how much more so in the United Nations!

8. In addition to citing Paulus, Professor Jiménez de Aréchaga cited a passage from the *Northern Cameroons* case (*I.C.J. Reports 1963*, p. 36) every word of which he said was applicable here (CR 91/21, 21 November 1991, pp. 27-28). I will not re-read the passage, but will merely repeat that the Court was referring there to a claim brought by a third party — that is to say, not an entity which was a direct bearer of rights under the Trusteeship Agreement but was merely indirectly interested. And its claim was brought under the jurisdictional provision of the Trusteeship Agreement, a provision the Court held to be part of the machinery of supervision which terminated with the Trusteeship Agreement. It is of course possible to apply the same words here, Mr. President, but only if one first takes the precaution of changing their meaning.

9. Incidentally, when Judge Wellington Koo described himself as "broadening and strengthening" the basis of the Judgment in the *Northern Cameroons* case — I refer to the passage cited by Professor Jiménez de Aréchaga (CR 91/21, 21 November 1991, p. 28) — that was no doubt true. The Court having fashioned in that case a careful and narrow path to its conclusion, Judge Wellington Koo reached the same conclusion by what I might describe as the four-lane highway of his formula about the termination of "all legal rights". Judge Wellington Koo may have reached the same destination on the facts as the majority, but he certainly got there by a different route. And Professor Jiménez de Aréchaga made no attempt to deal with what I described on Tuesday as the central difficulty with Judge Wellington Koo's argument — that is, the preference he gives for survival of the rights of third States and their nationals over the survival of the rights of the beneficiary of the trusteeship itself, the people of the territory. The majority judgment in the *Northern Cameroons* case deftly avoided that difficulty.

The General Assembly's "Implied Rejection" of the Nauruan Claim

10. Professor Jiménez de Aréchaga tacitly conceded that it was unreasonable to imply a termination from operative paragraphs 1 and 2 of General Assembly resolution 2347, on which Australia had earlier relied. His emphasis now was all on operative paragraph 3 (CR 91/21, 21 November 1991, pp. 25-26). Under that paragraph, the General Assembly:

> "Resolves accordingly, in agreement with the Administering Authority, that the Trusteeship Agreement for the Territory of Nauru . . . shall cease to be in force upon the accession of Nauru to independence on 31 January 1968."

But there is no more reason to treat this as an implied cancellation of rights than there is to treat as such a cancellation operative paragraphs 1 and 2. It is true that at a much later stage (in the Australian Prime Minister's letter of 1984), Australia stated that it had insisted on a withdrawal of the claim as a condition to Nauru obtaining its independence. But there is no trace of that insistence in the General Assembly debates. On the contrary, the historical record shows that Australia did not succeed in obtaining Nauru's agreement on this issue and as a result dropped its demand.

It is therefore strictly unnecessary to consider whether a forced renunciation of rights, had one been made, would have been valid. It is sufficient to re-emphasize that to infer such a cancellation from the silence of the resolution is unwarranted in fact, and especially unwarranted when one takes into account the relevant legal background of trusteeship and the adjacent legal principles to which I have referred.

11. Professor Jiménez de Aréchaga sought to reinforce the argument from termination by arguing that upon independence the Administering Authority became *functus officio*, and that thereafter there was nothing Australia could do to assist in the rehabilitation of the lands. He said: "In these circumstances it is obvious that the alleged obligation to rehabilitate the land became devoid of object and was consequently extinguished." (CR 91/21, 21 November 1991, p. 26.)

One only has to look at photograph 2 of Volume 2, Mr. President, to see that the obligation was not and is not "devoid of object". It is true that after independence, Australia had no right simply to come on the land and carry out its own rehabilitation scheme contrary to the wishes of Nauru. But that did not mean that it was free of any obligation at all. It is like arguing that a victim need not be compensated in other ways because one form of compensation — e.g., *restitutio in integrum* — has become impossible. The argument appears to be that you have no obligation to compensate a victim, once it has become impossible for you, yourself, to undo the harm by your own efforts. That is like saying that a plastic surgeon has no further responsibility to compensate for some disfigurement he has caused because the victim has been discharged from the surgeon's hospital, and he can no longer do the work himself.

In the same vein, Professor Jiménez de Aréchaga argued that a new obligation must have come into existence to pay compensation in lieu of rehabilitation, and queried how there could have been "such an automatic transformation or novation of the original obligation" (CR 91/21, 21 November 1991, pp. 26-27). But as Professor Pellet pointed out last week, the question whether there has been a breach of an international obligation, and the question what form of reparation should be awarded in the circumstances, are separate and distinct issues. That distinction is clearly recognized in the structure of the ILC's Draft Articles on State Responsibility. Merely because one form of reparation is unavailable does not mean that a claimant has to rely on a completely new and distinct obligation or has to show some form of novation. The breach was the same, the obligation was the same: the remedial issue follows, and of course, very much relates to the merits.

12. Professor Bowett also dealt with the issue of implied termination. In particular, he sought to reinforce his argument that there was an implied termination, by claiming that a judgment on issues of breach necessarily arose in the course of termination or revocation of the Trusteeship Agreement (CR 91/21, 21 November 1991, p. 44), so that whenever one terminates a document, one makes a judgment about the breach of that document at that point. If that is right, then any State which fears that it may have violated a treaty, or against which some complaint of violation has been made, has only to give notice of termination of the agreement and to refuse to agree as part of any subsequent discussion on any provision about its liability. Remember that this relates to past, not future breaches — to things already done and suffered. The Australian argument is inconsistent with the general law on survival of claims arising under treaties, to which I referred on Tuesday (CR 91/20, 19 November 1991, pp. 36-37). A State which receives notice of termination of a treaty is not thereby put on short notice to prove its claim or have it lapse by operation of law. And no analogous rule should be implied into the trusteeship system — the primary purpose of which, as the Australian argument so consistently

fails to accept, was the protection of the rights and the interests of the beneficiaries.

Was an Express Saving of the Claim Required?

13. I have already stressed that the role of the General Assembly in this matter was not one involving exclusive power. Nor was it one where the General Assembly resolution as such was creative of legal rights which had no basis in the relevant instruments or in the adjacent legal principle. Neither in the *Namibia* Opinion nor in the *Northern Cameroons* case did this Court treat the General Assembly as having, as it were, a general licence to prescribe new rights in relation to trusteeship. I refer also to the classical analysis of that issue by Judge Lauterpacht in his separate opinion in the *South West Africa (Hearing of Petitioners)*, Advisory Opinion.

It follows from this that the General Assembly's role was not to constitute the right in the post-independence period, but at most to recognize the existence of a continuing claim which was founded in the relevant legal instruments and in the adjacent legal principles. I need only say that in its reply, Australia barely addressed — and certainly did not refute — the Nauruan argument that there was sufficient recognition of its claim as a subsisting claim on the facts of the present case. Here, as in other contexts, the Australian argument can be described as a form of argument from inconvenience, which is to say that where something is inconvenient it should be ignored.

Mr. President, that completes my presentation on the issue of termination.

The Court adjourned from 11.15 to 11.35 a.m.

Mr. President, Members of the Court, I turn to the second subject.

JOINDER OF PARTIES

14. Mr. President, praise for an advocate is always pleasing. But praise should be reserved for the advocate who persuasively maintains the conclusion necessary for his client when neither reason, nor authority, nor principle, nor analogy, give him any support. I turn accordingly to Professor Pellet's ingenious treatment of the joinder issue.

Professor Pellet's Four Matters of Agreement

15. Professor Pellet conceded that the cases cited by Nauru under the rubric of joinder or indispensable parties were the relevant expressions of the principle of consent in the current context of admissibility — although he did his best to dispute their relevance on the facts. At the same time, he produced one additional authority, the *Eastern Carelia* Opinion, an Advisory Opinion involving a non-member of the League and distinguishable from the present case on any number of grounds (CR 91/21, 21 November 1991, p. 60). If the *Eastern Carelia* Opinion is your best authority you are in a parlous state.

16. And he set out three other points on which he said that there is now agreement between us (CR 91/21, 21 November 1991, pp. 46-47). One relates to the non-applicability of private law analogies, on which the Preliminary Objections of Australia had so heavily relied. I will not repeat what I said about this

earlier. I would only say that one does not have to be a believer, as Sir Hersch Lauterpacht was, in the principle of private law analogy to be impressed by the uniformity and justice of the results achieved by national legal systems in the field of concurrent responsibility, and of its procedural analogues. Moreover, it would be curious if international law, an essentially individualistic system, adopted a more collective approach to the problem of joint conduct than do national legal systems which have the procedures actually to enforce collective responsibility. So that, however one looks at it, the legal experience in this matter strongly favours the Nauruan position.

17. Another point now formally abandoned by Australia is the idea that the Administering Authority was a separate legal entity. But, again, the withdrawal was enforced and reluctant and, on key issues, even illusory. For example, Professor Pellet described the Administering Authority as "juridiquement organisée et consacrée par des accords internationaux solennels" (CR 91/21, 21 November 1991, p. 50). But listening to Professor Pellet, it appears that the principal point of this juridical organization was to evade juridical liability, the principal point of the consecration to evade the sacred trust. Again and again Professor Pellet sought refuge in legal constructs which bore little or no relationship to the political and administrative realities, and which had no apparent point other than the point of escaping liability for a State bound, as a Member State of the United Nations, by the Charter, and, as a participant, by the Trusteeship Agreement. While denying that there was separate corporate personality, Australia seeks to limit its liability by hiding behind labels.

18. The fourth area of agreement was even less happy. It relates to the question of the equal and conjoint responsibility of the three Partner Governments for the British Phosphate Commissioners. It is convenient to leave that issue until later.

The Principle of Consent and the Admissibility of These Proceedings

19. Professor Pellet continued to insist that the Court could not decide the case unless it was able to decide that Australia alone is responsible — that is to say, unless the Court is able to negate the responsibility of any other State (see CR 91/20, 19 November 1991, pp. 90-91). In that context, he argued that simultaneity of decision was enough to attract the *Monetary Gold* principle — he had, the Court will remember, already conceded that this was not the case where any responsibility of another State was a *préalable nécessaire*, a "necessary precondition", to a finding against Australia (see CR 91/21, 21 November 1991, pp. 60-61). That is not the present case. But, he said, simultaneity was enough.

20. Mr. President, the reason why simultaneity is not enough is that if a finding adverse to another State — in its implications, that is to say — is merely simultaneous, then it is not a finding at all, merely an implication, such as the implication the Court did not resist in the *Nicaragua* case, or the finding that would have been tantamount to a decision that it did not resist in the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* case. By contrast, in *Monetary Gold* the Court, in deciding on the issues before it actually had to decide, in a manner binding on Albania, questions relating to its legal responsibility. Implications — even necessary or inevitable implications — tantamount to a decision, none of these were enough in that case. As a court of law it had actually to find Albania liable. And that, of course, it could not do.

21. The point can be tested as follows. Assume that Albania had intervened in the *Monetary Gold* case — as it had been hoped that it would do — it would

immediately have become, in effect, the sole respondent, with the other four States each bringing their claims against it and arguing about priorities — and this without any change being necessary in Italy's Application. By contrast, in the present case, if the other two States were to intervene, that would not affect in the slightest the Nauruan case against Australia. Indeed, it is not entirely clear what the point of their intervention in the present case would be, since such intervention could not have the effect of expanding the range of claims Nauru makes in its Application so as to incorporate claims against other States, and since the Court's judgment would not, therefore, bind them in relation to their own legal position vis-à-vis Nauru.

22. Professor Pellet seemed to rely on a theory of liability in the present case in which the three States were, under the Trusteeship Agreement, effectively guarantors of a particular state of affairs, so that a mere determination by the Court that the Trusteeship Agreement required that state of affairs, and that it was not achieved, would necessarily imply their liability (e.g., CR 91/16, p. 63). The first answer is still that necessary implication is not enough, only an actual decision against a State. But the primary Nauruan theory of liability is that Australia, as the State with the actual legal and administrative power over Nauru at the relevant times, should have taken certain steps in relation to a situation it had allowed to occur and failed to do so. By no means would the same argument apply to the other two States which never had actual legal or administrative responsibility over Nauru. It may be, of course, that they are nonetheless liable because Australia's acts were done on their behalf. But that would involve separate issues, including the determination of the meaning of the words "on behalf of" in Article 4 of the Trusteeship Agreement — issues which simply do not arise in the present case.

Professor Pellet also made some points about reparation (CR 91/21, 21 November 1991, pp. 58-59). In that context, he argued that any decision adverse to Australia — that is to say, any decision on reparation adverse to Australia — had to take as its basis a decision adverse to the other two States. But again, this misunderstands the Nauruan position, which is very simple. First of all, the basis on which Nauru claims full reparation against Australia is that, in its view, that is what international law requires in the case where particular damage is done by acts or omissions imputable to a State and contrary to an international obligation binding on that State. If Nauru is wrong on that point — although I do not see how it could be — it claims just as much reparation as international law allows, including a declaration. These rules of international law on which Nauru relies apply in cases where no other State had any involvement of any kind. But they also apply in cases where some other States were involved. For example, as here, where the other States were involved as secondary wrongdoers or even, as in the *Corfu Channel* case, where the other State was the primary wrongdoer. So that even in the context of reparation, there is no question that a decision adverse to Australia requires a decision — whatever its implications — a *decision* — against any other State.

Australia's Objections Based on the Joint Character of the Trusteeship

24. This was, again, the subject of lengthy and elaborate argument by Australia in reply. Before dealing with these arguments, it is necessary to make one fundamental point. The ingenuity of jurists is a means and not an end. In the end it is necessary to construe treaty provisions, and the administrative arrangements they embody, in a way which gives effect to the major underlying principles, and which is reasonably faithful to the realities of the case. There is no

point in simply multiplying hypotheses, in constructing a heaven of juristic concepts, especially when the new juristic concepts so constructed have as their only purpose to allow a State to limit or deny responsibilities it has freely undertaken.

25. For example, Professor Pellet argued that the Trusteeship Agreement condemned Australia to act "together with" the other States in the pursuance of the Trusteeship Agreement. Like much else that he said, this is true as far as it went: Australia failed in its aim to be allowed to be a single Administering Authority. But the salient point is not that Australia was compelled to administer the Trusteeship together with other States, but how little that "together" meant. Australia could not be displaced without its consent, which it never even considered giving. By the end — and the end was crucial — it had complete legal authority on Nauru, no obligation to give information to the other States, the right (under Article 6 of the 1965 Agreement) to make any decision about Nauru independently of the view of the other States, and so on. I will not repeat what I said on those questions the other day (see CR 91/20, 19 November 1991, pp. 73-82).

In particular, it is misleading, when speaking of the Trusteeship period, which is the primary period the Court has to consider, to say that the three States could have freely changed the administrative arrangements. Australia was given a specially privileged status: without its consent no change was possible.

Professor Pellet took refuge in the possibility of an alternative structure being agreed on by the three States: an alternative structure which would have involved, in truth, a joint administration. Nauru's position is first, that this would make no difference, since each State would remain liable for its own wrongful acts — that would be the common organ situation of which the International Law Commission spoke. But in the second place, the Court can only judge the responsibility of a State — and the admissibility of proceedings to which a State is a party — in the circumstances as they actually occurred. It is not the Court's task to judge alternative worlds, fictional hypotheses.

26. Against the clarity of the texts and the reality of the administrative arrangements, Professor Pellet constructs a system under which the administration of the trust was first given to three States equally and conjointly, and then delegated by them to Australia, so that the three States stood as a phalanx — not a legal person, but as if they were one — between the Nauruans and the State with the real power to do harm or good (CR 91/21, 21 November 1991, pp. 54-55). That interpretation of the Trusteeship Agreement is, to put it mildly, tortured. And what is its point? Only to make Australia's position derivative, in other words, to convert the situation into one more closely analogous to that of *Monetary Gold*. The fact is that in the Trusteeship period, the other two States never had anything to give Australia: had they wished to take different decisions, to change matters of policy, they had no power to do so, individually or acting together against Australia's will. Professor Pellet suggested that the two of them alone could have complained against Australia alone for some wrong done by it as representative (CR 91/21, 21 November 1991, p. 55). By what legal principle is Australia to be excluded from the indivisible legal nonentity thus constructed as a barrier between Australia and the real world (including the Nauruans)? The only principle appears to be that Australia was unlikely to complain against itself — as unlikely as to act as agent for itself, one must reply.

27. Mr. President, the point has been sufficiently made. I only pause to say that it was sad to hear George Scelle's magnificent hypothesis, the "dédoublement fonctionnel" which sought to construct an international order out of the individual and mostly self-interested acts of States, misused to justify a breach of trust (CR 91/21, 21 November 1991, pp. 54-55). Legal reasoning is not to be

divorced from purpose, context or function — as the Australian argument sought to do.

28. (In parenthesis, Mr. President, my understanding is that Augustus only became Emperor after the triumvirate had ceased to function (CR 91/21, 21 November 1991, p. 58). The reference to His Imperial Majesty on this occasion — far from Britannic — had a certain point, since Australian predominance took some time to become established, at least in a form which the other two States could do nothing to change.)

Australia's Objections Based on the Joint Character of the British Phosphate Commissioners

29. In the domain of reality as distinct from legal fiction, the principal reason given by Professor Pellet for emphasizing the joint character of the administration of Nauru — not joint in the sense that there was some degree of involvement, since Nauru has never denied that, but joint in the sense of inseparable — was that in the area of exploitation of phosphates the operation was truly joint, because it was based on the joint activity of the British Phosphate Commissioners (CR 91/21, 21 November 1991, pp. 56-57).

On this point, despite what was said by Professor Pellet, there is little to add (CR 91/20, 19 November 1991, pp. 82-84). The BPC had no legal rights on Nauru which overrode the Trusteeship obligation to the people of Nauru. Exactly what their legal rights were with respect to the phosphate is in dispute. Even if they had legal rights over the phosphate under the Australian laws which applied to Nauru at the time, the consistency of those rights with the Trusteeship obligation is in dispute. Even if the existence of those legal rights over time was consistent with the Trusteeship obligation, the manner of their exercise, in Nauru's view, gave rise to obligations for Australia in the exercise of its governmental authority over Nauru which it failed to discharge. These matters are dealt with, of course, in the Nauru Memorial.

As I argued on Tuesday, the joint character of the BPC as an industrial enterprise is simply irrelevant to the question of the admissibility of the present claim — although Australia's preference for its own commercial interests over the rights and interests of the people of Nauru protected by the Trusteeship Agreement and by adjacent legal principles may well be relevant at the stage of the merits, for example, it may help to demonstrate Australia's international responsibility as Administrator for the resulting state of affairs.

30. The meaning and effect of Article 13 of the 1919 Agreement, are also relevant to the merits of the claim, but like these other matters they have no bearing on admissibility. Professor Pellet seeks to argue (CR 91/21, 21 November 1991, p. 57) that because Article 13, in his view, prevented Australia from doing anything to protect the Nauruan people from the combined depredations of the BPC, and because Article 13 was contained in a tripartite Agreement (the 1919 Agreement), then the issue of Australia's responsibility is inseverably bound up with that of the other Parties to the 1919 Agreement. But that does not follow. First of all, it is far from clear that Article 13 has the meaning Australia relies on. But in any event, the question here is not whether Australia may have been in breach of Article 13 vis-à-vis other parties to the 1919 Agreement, but what Australia's obligations were to Nauru under the Trusteeship Agreement, an instrument which in case of conflict must have prevailed over the 1919 Agreement.

There is, no doubt, an argument — Australia has not yet had the opportunity to make it — based on Article 80 of the Charter, that any right Australia might have had under the 1919 Agreement to decline to give effect to the "sacred trust" was preserved into the post-1945 period — that is the Article 80 arguments. All of that takes us profoundly into the merits. The short answer is that the relevant provisions — the provisions of the 1919 Agreement, and especially Article 13 whatever it meant — are not opposable to Nauru, and that their effect on Australia's legal responsibility is not a matter to be determined at this stage.

31. One of Professor Pellet's difficulties in dealing with terms like "Partner Governments" is that the partnership arrangement, under which the British Phosphate Commissioners operated, was not even subject to a system of joint and inseverable liability under its own proper law in cases of civil wrong or breach of trust. That makes it even more difficult to understand how its involvement as one of the elements of the present affair could create some additional form of inseverable liability, or could give rise to some additional reason for Australia being held less responsible for its own acts as governing authority. The repetition of the term "partner" — even the counting of the frequency of the words (CR 91/21, 21 November 1991, pp. 62-63) — makes no difference to the legal position. And it should be stressed that this is no question of mere analogy from private law, but a question of the proper law of the relevant institution. The term "partner" in matters of civil wrong or breach of trust has the common-law rule of joint and several liability ingrained in it. The British Phosphate Commissioners were a common-law partnership. By what principle, when we move to the international plane and pay due regard both to the purpose and the antecedents of the "sacred trust", are we placed in the situation that the mere involvement of the BPC has made liability inseverable?

Australia's Objections Based on the Existence of an Alleged "Joint Liability"

32. With great respect — and I am dealing now more generally with the question of joint liability — the principal strategy of the Australian argument here was something I might call argument by thesaurus — the repetition of words roughly synonymous with "joint" or "inseparable", in the hope that the collection of synonyms might persuade where legal analysis, including comparative law analysis, has failed, or worse, turned out to contradict the Australian position (CR 91/21, 21 November 1991, p. 63). In any event, I will not try the Court's patience by dealing one by one with the particular arguments made by Australia but will merely list them. No doubt the Court, examining the various authorities and references cited, will reach its own conclusion. And the terms of disagreement between the Parties are so acute as to need no further emphasis from me.

33. The Australian failings in argument include the following:

- its failure to cite any convincing authority for its position on inseverable liability (whereas it can only seek to diminish, without destroying, the authorities cited by Nauru (CR 91/21, 21 November 1991, pp. 63-64);
- its brushing aside of the ILC's work, which does indeed support the notion of separate but distinct liability and that in a case (of joint organs) where inseverable liability was a much more likely outcome than it is here (CR 91/21, 21 November 1991, p. 65);
- its assumption (contrary to all legal experience), that in the case of concurrent liabilities one partitions the cause of the loss on some principle of comparative fault or comparative gravity of cause and effect, and does so in such a way as to increase the burdens of recovery imposed by the law on the victim in the interests of the protection of the wrongdoers (CR 91/21, 21 November 1991, p. 67);

— and above all, its failure to take into account the essential juridical context of the present case, the context of trusteeship, in which the interests of the beneficiary are to be given priority.

34. Thus at the end all Professor Pellet can say, confronted with the reproach that his argument will lead to a denial of justice, is that this is not an exceptional case in international law (CR 91/21, 21 November 1991, p. 68) — as if it were not the function of a court, where possible consistent with basic principles of jurisdiction, to do justice rather than to deny it. In the field of mandate and trusteeship agreements and, with one regretted exception in 1966, the Court has always managed to achieve that, giving effect to the intentions of the founders of the system rather than the ambitions of the closet colonizers, the disguised annexationists, who have with their various subtleties — including legal subtleties — sought to prevail.

35. Mr. President, Members of the Court, that concludes the Nauruan arguments on these two issues. With your leave, Mr. Keke, as Co-Agent, will now present Nauru's final submissions.

STATEMENT BY MR. KEKE

CO-AGENT FOR THE GOVERNMENT OF NAURU

Mr. KEKE: Mr. President, honourable Members of the Court, may I place before this Court the final submissions of the Republic of Nauru.

FINAL SUBMISSIONS ON BEHALF OF THE REPUBLIC OF NAURU

In consideration of its written and oral pleadings the Government of the Republic of Nauru requests the Court:

To *reject* the preliminary objections raised by Australia, and
To *adjudge* and *declare*:

(*a*) that the Court has jurisdiction in respect of the claims presented in the Memorial of Nauru, and
(*b*) that the claims are admissible.

In the alternative, the Government of the Republic of Nauru requests the Court to declare that some or all of the Australian preliminary objections do not possess, in the circumstances of the case, an exclusive preliminary character, and in consequence, to join some or all of the objections to the merits.

Mr. President and honourable Members of the Court, I wish to thank you sincerely for your forbearance and kindness in listening to the oral presentation and final submissions on behalf of the Republic of Nauru.

CLOSING OF THE ORAL PROCEEDINGS

The PRESIDENT: So that brings to an end the oral proceedings in the case concerning *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*.

Before adjourning the Court I would like, on behalf of the Court, to thank the Agents and Counsel on both sides for assisting the Court with very able arguments and also to congratulate them on maintaining a pleasant and even friendly atmosphere throughout the hard-fought case. We are very grateful for that.

Before I actually adjourn the Court I ought to use formal words which is usual before adjournment and say that, subject to this reservation, whereby the Agents of the Parties are requested to remain at the disposal of the Court for any further information or assistance it may require, I can now declare the present proceedings closed and the Court will now adjourn. Thank you very much.

The Court rose at 12.00 noon.

NINTH PUBLIC SITTING (26 VI 92, 3 p.m.)

Present: [See sitting of 22 XI 91, Judge Bedjaoui absent.]

READING OF THE JUDGMENT ON PRELIMINARY OBJECTIONS

The Court has met today pursuant to Article 58 of the Statute to deliver in open court its judgment on the preliminary objections raised by the Government of the Commonwealth of Australia in the case concerning *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*, brought before the Court on 19 May 1989 by an Application of the Government of the Republic of Nauru.

Judge Bedjaoui, who took part in the hearings and deliberation on the objections, and participated in the vote and in the Judgment of the Court, is unfortunately unable to be present at today's sitting.

Following the usual practice, I shall not read the opening paragraphs of the Judgment which set out the procedural history of the case and the submissions of the Parties. I shall also summarize some passages of the Judgment. The authoritative text of the Judgment is the French version, but I shall now read the English text of the Judgment.

[The President reads paragraphs 8 to 71 of the Judgment[1].]

I shall now call upon the Registrar to read the operative provisions of the Judgment in the French authoritative version.

[The Registrar reads the operative clause in French[2].]

Thank you. I have to add that Judge Shahabuddeen appends a separate opinion to the Judgment. I myself, the Vice-President, Judges Ago and Schwebel append dissenting opinions to the Judgment.

Mimeographed copies of the text of the Judgment are at present available. The usual printed text will be published in due course. The further procedures in this case will be determined by the Court in accordance with Article 79, paragraph 7, of the Rules of Court after I have consulted the Agents of the Parties.

There being no other business before the Court this afternoon, the Court is now adjourned.

(Signed) Sir Robert JENNINGS,
President.

(Signed) Eduardo VALENCIA-OSPINA,
Registrar.

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[1] *I.C.J. Reports 1992*, pp. 245-267.

[2] *Ibid.*, pp. 268-269.

RÉPONSES ÉCRITES AUX QUESTIONS POSÉES PAR LES MEMBRES DE LA COUR

WRITTEN REPLIES TO QUESTIONS PUT BY MEMBERS OF THE COURT

REPLY BY AUSTRALIA TO A QUESTION PUT BY A MEMBER OF THE COURT

The second question addressed to Australia by Judge Shahabuddeen on 19 November 1991 referred to a statement made by Professor Jiménez de Aréchaga on Monday, 11 November and asked:

> "What was the legal basis of the responsibility for meeting the cost of rehabilitation, which Australia said it did not decline, but on the contrary had met in the manner described?"

Australia has *never* assumed a *legal* responsibility for meeting the cost of rehabilitation. It did, however, acknowledge that the Nauruans genuinely believed that the Partner Governments had a moral or political responsibility, and it is this responsibility which they have in fact met.

The moral or political character of this responsibility appears from the circumstances of Australia's acknowledgment of it. There is nothing unusual in Governments accepting responsibilities which are not legal.

In his speech, Professor Jiménez de Aréchaga referred to a statement by the Chairman of the Working Group set up by the Partner Governments and Nauruan representatives in 1966 to examine the Davey Committee Report. That statement concerned Australia's responsibility for meeting the cost of rehabilitation.

The Head Chief had immediately preceding this statement

> "commented on the Nauruan view of the responsibility of the Partner Governments to restore the mined lands. [The] Head Chief said — What the Nauruan people were seeking is Government acceptance of their responsibility but how the Governments finance this responsibility is up to them. However in the eyes of the Nauruan people this responsibility is not discharged if the Nauruan people receive less from the phosphate in order to enable the Governments to meet their share of the costs of rehabilitation." (Australia's Preliminary Objections, Vol. II, Ann. 7, p. 34, para. 14.)

The Chairman's response was as follows:

> "*The Chairman* emphasised that the Government was not saying that it did not take any responsibility for meeting the cost of rehabilitation, but it would do this by ensuring that the payments to the Nauruans would be sufficiently generous to enable all expenditure necessary for the long-term welfare of the Nauruans, including rehabilitation if they decide upon it, to be met." (*Ibid.*, p. 34, para. 15.)

To this the Head Chief replied:

> "that the Nauruan people, having decided upon rehabilitation, considered it a matter of principle that the Governments should accept responsibility for rehabilitation of the areas already mined. He said that as there was not an acknowledgment of this responsibility he could not see that any advantage would be served by the Working Party discussing the Technical Committee's Report." (*Ibid.*, p. 35, para. 16.)

The record leads to the following conclusions. First, that it was the Nauruans, not the Partner Governments, who first raised this matter of responsibility;

secondly, that Nauru saw this responsibility as the responsibility of all the Partner Governments, not just Australia; and finally, and most importantly, it was not said that this was a legal responsibility. Rather the responsibility of which Nauru spoke was a moral, political or even an economic one. In any event, that is clearly how it was treated by the Partner Governments. The Head Chief spoke of what seemed fair "in the eyes of the Nauruan people" and the Chairman, of payments "sufficiently generous for their long-term welfare, including rehabilitation if they decide upon it". There is absolutely no sense in which the Nauruans were asserting any kind of legal responsibility. You will find no reference whatsoever to the Trusteeship Agreement.

Further, this understanding is completely consistent with the statement made by the Special Representative of the Administering Authority in the Trusteeship Council in November 1967. In terms similar to those of the Chairman of the Working Group, the Representative also acknowledged that the Partner Governments had a responsibility to see that the financial arrangements for Nauru were sufficient to enable the Nauruans to provide for their future. He added that he considered the arrangements which had in fact been made were "just" and "as far as one could judge" that they would be "ample" (Australia's Preliminary Objections, Vol. II, Ann. 28, para. 402).

What is more, even in these present proceedings, Nauru has thought to invoke moral considerations to lend support to its claim. Thus, it asserts that on its view it would be "neither fair nor equitable for Australia now to abdicate its responsibility to rehabilitate the phosphate lands" (CR 91/18, p. 28).

And, as Australia has already noted in its written and oral proceedings, although Nauruan representatives asserted this responsibility before independence, they did not assert that the failure to meet it would amount to breach of the Trusteeship Agreement as such.

The acceptance by the Partner Governments of some general responsibility of this nature was perfectly natural. It is true that, under the Trusteeship Agreement, the Partner Governments as the Administering Authority undertook to meet certain broad obligations. It was, however, for them to decide in their discretion how these obligations might best be fulfilled. That is, the Partner Governments could choose how to meet their legal obligations and were not required to adopt any specific course, providing they ultimately satisfied their obligations under the Trusteeship Agreement. These obligations were, after all, obligations of result.

Furthermore, in exercising their administering authority, the Partner Governments necessarily brought with them their own understanding of an appropriate moral, social, political and economic order. They, therefore, brought with them an acceptance of a host of broad moral, political and economic responsibilities. The discharge of these responsibilities was clearly not a matter of law, although in keeping with the basic objectives of the Trusteeship system as laid down in Article 76 of the United Nations Charter.

REPLY BY NAURU TO QUESTIONS PUT BY A MEMBER OF THE COURT

1. During oral hearings held on 19 November 1991, Judge Schwebel asked the following questions for the Republic of Nauru to answer:

> "What is the position of Nauru as to why it did not at the same time bring suit against New Zealand? What is the position of Nauru as to why it did not at the same time bring suit against the United Kingdom?"

2. The reason why the Republic of Nauru decided to institute the current proceedings against Australia alone has been explained at some length in Nauru's Application that instituted these proceedings on 19 May 1989 (see particularly paragraphs 5 to 12 and 15 to 17); the Nauru Memorial (Parts III, IV and V); the Nauru Written Statement (Part I and Part IV, Chapter 5); and the oral presentation of Professor James Crawford, counsel for Nauru, on 19 November 1991 (CR 91/20, pp. 59-96).

3. Nauru holds all the three former Partner Governments, namely Australia, New Zealand and the United Kingdom, individually responsible for breach of obligations under the United Nations Trusteeship System and the principles of general international law, and in particular for breach of obligations in respect of rehabilitation of phosphate lands mined out before 1 July 1967. However, in Nauru's view, it was Australia which played *the* dominant role in the administration of the Territory of Nauru ever since the grant of the Mandate on 17 December 1920 until 31 January 1968. The Australian dominance over and control of the Territory was underscored, *inter alia*, by the following principal facts on record:

(a) Since the Mandate of 17 December 1920, through the United Nations Trusteeship until 31 January 1968, Australia always had, and exercised, the full power of administration over Nauru. The Australian flag, to the exclusion of the Union Jack and the New Zealand flag, flew over the Territory throughout this period.

(b) The Administrator of Nauru always remained Australian civil servant appointed by the Australian Government. At least since 1923, the Administrator reported directly and exclusively to the Australian Government through the Australian Government Department responsible for Australian Territories.

(c) By virtue of Article 22, paragraph 8, of the Covenant of the League of Nations, Australia administered Nauru "as an integral portion of Australian territory". In terms of its internal constitutional framework, until the Nauru Act 1965 (Cth), Australia treated Nauru as a Crown colony asserting its right to govern the Territory under prerogative powers. With the enactment of that Act by Australia, Nauru ceased to be a Crown colony, but it remained an Australian territory under sole Australian authority.

(d) Australia had, and exercised, the exclusive legislative authority to enact laws for Nauru, ever since it took over the administration of the Territory. By this power to enact laws, Australia established and operated, for the entire duration of its administration, a system of Government monopoly over the phosphate industry. By a legislative feat, the Australian administration even achieved "expropriation" of phosphate rights of the Nauruan landowners

By a similar exercise of the legislative authority it also repealed the extant German laws regulating the conduct of mining, which had required a degree of rehabilitation of mined lands and the payment of compensation to the landowner. No attempt was made by Australia to replace them with any equivalent safeguards (see generally, Nauru Memorial, Vol. 1, paras. 512-551 at pp. 188-189; *ibid.*, Part I, paras. 22-27 at pp. 10-11; paras. 54-58 at pp. 22-23; paras. 63-68 at pp. 26-28; paras. 80-100 at pp. 33-38; see also Nauru Written Statement, paras. 10 and 11 at pp. 7-8).

(e) The Nauru Act 1965 which established a Legislative Council on Nauru and the Nauru Independence Act 1967 were exclusively Australian legislation.

(f) The defence of Nauru was a matter exclusively of Australian concern.

(g) The international agreements which were applied to Nauru were a selection of international agreements to which Australia was a party.

(h) Every Annual Report to the League of Nations, and later to the United Nations General Assembly was presented by Australia, and orally dealt with in the Permanent Mandates Commission of the League of Nations and the Trusteeship Council of the United Nations by the Australian delegation.

(i) In 1950s and 1960s it was Australia which was instrumental in reporting on the feasibility of Nauruan rehabilitation through an Australian Government agency, namely the Commonwealth Scientific and Industrial Research Organisation, and then through the Davey Committee.

(j) Australia called for increasing tonnages of phosphate for the benefit of its own agriculture.

(k) New Zealand and the United Kingdom, the other former Partner Governments, recognized that the actual responsibility for administration of the Territory was vested in Australia (see e.g. the statement by Mr. Shaw of the United Kingdom, United Nations Trusteeship Council, *Official Records*, 13th Special Session, 1323rd meeting, p. 4, para. 30).

4. In the light of the legal considerations set forth in the written statement of the Republic of Nauru and during the oral hearings, Nauru is entitled to proceed against any one of the three States responsible for their acts and omissions during the currency of the Trusteeship in Nauru.

5. In these circumstances, the Republic of Nauru took the policy decision to proceed against Australia alone. By this decision, it has not in any way waived its rights under international law to alternative remedies, including its independent right to proceed against New Zealand and the United Kingdom, as has been clarified by the diplomatic notes despatched by Nauru Government on 20 May 1989 to both New Zealand and the United Kingdom (see Annex 80, Numbers 29 and 30, Nauru Memorial, Vol. 4, pp. 568-571). The present non-exercise of its rights to alternative remedies, in Nauru's view, has no bearing on the separate responsibility of Australia in the current proceedings, or on the receivability of Nauru's claims in these proceedings, or on questions of judicial propriety, or on the merits of Nauru's claims against Australia. There exists no rule of international law requiring a State to bring simultaneous proceedings against all States which might possibly be held concurrently liable in respect of particular damage. This is true *a fortiori* where the proceedings are brought against the principal wrongdoer as they have been in the present case.

CORRESPONDANCE

CORRESPONDENCE

JOINT LETTER OF THE PARTIES NOTIFYING THE COURT THAT THEY HAVE AGREED TO DISCONTINUE THE PROCEEDINGS IN THE CASE CONCERNING *CERTAIN PHOSPHATE LANDS IN NAURU (NAURU* v. *AUSTRALIA)*

This is to notify the Court that in consequence of having reached a settlement, the Republic of Nauru and the Commonwealth of Australia pursuant to Article 88 of the Rules of Court have agreed to discontinue the proceedings in the case *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*.

(Signed) V. S. MANI,
Leo KEKE,

Co-Agents,
Republic of Nauru.

(Signed) Gavan GRIFFITH,

Agent,
Commonwealth of Australia.

DOCUMENT PRÉSENTÉ À LA COUR

DOCUMENT SUBMITTED TO THE COURT

AGREEMENT BETWEEN AUSTRALIA AND THE REPUBLIC OF NAURU FOR THE SETTLEMENT OF THE CASE IN THE INTERNATIONAL COURT OF JUSTICE CONCERNING *CERTAIN PHOSPHATE LANDS IN NAURU*

THE REPUBLIC OF NAURU AND AUSTRALIA,

Wishing to strengthen the existing friendly relations between the two countries, and

Wishing to settle amicably the application brought by the Republic of Nauru against Australia in the International Court of Justice,

Have agreed as follows:

Article 1

(1) Australia agrees that, in an effort to assist the Republic of Nauru in its preparations for its post-phosphate future, it shall pay the Republic of Nauru a cash settlement of one hundred and seven million dollars ($A107 million) as follows:

(a) The sum of ten million dollars ($A10 million) on or before 31 August 1993.
(b) The sum of thirty million dollars ($A30 million) as soon as it may lawfully be paid and not later than 31 December 1993.
(c) The sum of seventeen million dollars ($A17 million) on 31 August 1994.
(d) An amount of fifty million dollars ($A50 million) to be paid at an annual rate of $2.5 million dollars, maintained in real terms by reference to the Australian Bureau of Statistics' non-farm GDP deflator, for twenty years commencing in the financial year 1993-94.

The above payments are made without prejudice to Australia's long-standing position that it bears no responsibility for the rehabilitation of the phosphate lands worked out before 1 July 1967.

(2) At the end of the 20 year period referred to in paragraph (1) *(d)* the Republic of Nauru shall continue to receive development co-operation assistance from Australia at a mutually agreed level.

Article 2

In consequence of the undertakings by Australia in Article 1, the parties agree that they shall take the action necessary to discontinue the present proceedings brought by the Republic of Nauru against Australia in the International Court of Justice.

Article 3

The Republic of Nauru agrees that it shall make no claim whatsoever, whether in the International Court of Justice or otherwise, against all or any of Australia, the United Kingdom of Great Britain and Northern Ireland and New Zealand, their servants or agents arising out of or concerning the administration of Nauru during the period of the Mandate or Trusteeship or the termination of that administration, as well as any matter pertaining to phosphate mining, including matters pertaining to the British Phosphate Commissioners, their assets or the winding up thereof.

Article 4

This Agreement shall enter into force on the date on which the parties have notified each other that the constitutional requirements of each party for the entry into force of this Agreement have been complied with.

DONE in two originals at Nauru this 10th day of August 1993.

For Australia,	For the Republic of Nauru,
(Signed) Paul KEATING, Prime Minister.	*(Signed)* Bernard DOWIYOGO, President.

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